Legal Framework for Arbitration and Mediation in North Macedonia and Germany – Executive Summary

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A. Introduction

The Republic of North Macedonia is a small, landlocked, and developing country with an open and import-oriented economy. Considering these characteristics, the country is dependent on establishing and maintaining trade relationships with its key strategic partners as well as attracting

foreign investments. The country has been in a slow process of transition since declaring its independence in 1991. In the past two decades, North Macedonia has also been aspiring to become a member of the European Union (EU). The road towards EU accession has been long and cumbersome, with blockades from neighboring countries and political turmoil which hindered the reform processes and the country's economic performance. However, despite the various impediments, the country remains determined to continue its path of accession to the EU through the implementation of EU standards.

To continue along the path of EU integration and economic growth with the associated political stability, North Macedonia needs foreign investment, be it direct or portfolio investment. In addition, trade growth must be generated. However, such investments are often associated with great risks for the investor or foreign trading partner. In case of foreign investment, especially outside the EU or other established trading nations, there is a risk that profits will be minimized by contractual partners or by government intervention. National courts' proceedings are either not to be sought due to insufficient legal protection, or are often considered only partially effective by all partners involved due to the length of the process. As a result, alternative dispute resolution (ADR) mechanisms are used worldwide in the areas of international investments, as well as cross-border trade. ADR is considered a valuable pillar for improving access to justice, enabling companies in many emerging economies to resolve disputes quickly. This suggests that effective ADR has an important impact on a country's investment climate and thus plays a crucial role in promoting the development of the country.

For these reasons, the "Promoting Mechanisms for Alternative Dispute Resolution and Mediation in North Macedonia" research project aims to analyze the current legal situation in the field of ADR in North Macedonia, to assess the practical implementation, to identify any need for governmental or legislative action, and to utilize the results in the context of a training course.

Following the aim of the project, this report provides a comprehensive overview of the national legal framework in the field of ADR in the Republic of North Macedonia and analyzes it against the international legal framework and the national framework of Germany. The report first outlines the international framework for ADR, including the regulations of the International Centre for Settlement of Investment Disputes (ICSID), the New York Convention (NYC), the International Chamber of Commerce (ICC), among others, and analyses their application in North Macedonia. The national framework of Germany was included in the report to follow a comparative

approach between North Macedonia and Germany. This approach aims to compare a country with a less developed framework, with one where ADR is a viable and commonly utilized option.

An important aspect and the starting point in relation to the national legal framework of the report is the overview of the current judicial system in both North Macedonia and Germany. This is important not only because the judicial system is one of the main pillars in the implementation of the rule of law, but also because of its interconnection with ADR and its vital role in the support of ADR mechanisms. Therefore, an overview of the civil proceedings in both Germany and North Macedonia is included in this report.

In relation to arbitration, the report addresses both commercial and investment arbitration. Arbitration is looked at from both a regulatory and practical perspective, with the intention of identifying insufficiencies in regulation, education among practitioners, as well as institutional shortcomings in support and promotion of arbitration. Both domestic and international commercial arbitration in North Macedonia are comprehensively analyzed, with the report outlining the laws regulating arbitration in North Macedonia, arbitration agreements, composition of arbitral tribunals, national courts' role in arbitration, recognition and enforcement of foreign arbitral awards, arbitrability of disputes, party representation in arbitral proceedings, the grounds for setting aside an arbitral award, arbitral institutions, arbitration practice, etc.

The investment arbitration practice in North Macedonia is also analyzed, with the report addressing investment treaties concluded by North Macedonia, the investment protection offered therein, the legal regulation of foreign investment in the country, case handling of investment arbitration disputes brought against North Macedonia, and the country's position in relation to investment disputes.

Regarding mediation and its practice, the report provides an analysis of mediation as a means for dispute resolution in North Macedonia by addressing the legal framework of the country and its implementation. It provides an overview of the laws regulating mediation, the mediation agreements, mediation-eligible disputes, rules on mediators, legal effects and possible challenges of mediation settlement agreements, etc. The purpose of the analysis is to identify any shortcomings in the regulation, practical implementation as well as in the institutional support and promotion of mediation.

B. International Framework

I. Arbitration

1. UNCITRAL Model Law

The UNCITRAL Model Law on International Commercial Arbitration ("the Model Law") is designed to assist States in reforming and improving their domestic laws on arbitral procedure, taking into consideration the unique nature of international commercial arbitration. The Model Law was adopted by the United Nations Commission on International Trade Law (UNCITRAL) on 21 June 1985, amended in 2006.[1] In the interest of harmonising national laws on arbitration, the Model Law has a broad application and comprehensively covers many aspects related to international arbitration to reach greater uniformity among countries.[2]

The Model Law observes the following principles:

- That the parties should be free to agree on how their arbitration should be conducted.
- That, in the absence of agreement, the arbitral tribunal should be able to fashion the arbitration to suit the parties' needs.
- That the arbitration should be conducted in accordance with rules, enforceable in courts.
- That the arbitration should be conducted fairly.
- That the arbitration should not be unduly affected by the municipal law of the country in which it is held.
- That there should be uniform treatment of all awards, irrespective of their place of origin.
- That there should be certainty as to the extent of court involvement.
- That national legislation should take account of the principal international instruments, especially the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention").[3]

1 Explanatory Note by the UNCITRAL secretariat on the 1985 Model Law on International Commercial Arbitration as amended in 2006, p. 23.
2 UNCITRAL Model Law on International Commercial Arbitration, Explanatory Documentation prepared for Commonwealth Jurisdictions.
3 Ibid, p. 6.

Arbitration Agreement

Chapter II of the Model Law deals with the arbitration agreement, including its recognition by national courts. The provisions under this chapter provide for a broad interpretation of an arbitration agreement. The Model Law provides two options under Article 7, one, wherein it confirms the validity of a commitment by the parties to submit to arbitration an existing or a future dispute. It requires the written form of the arbitration agreement but recognizes a record of the "contents" of the agreement "in any form".[4] Thus, it includes arbitral agreements made by "an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by another" and "the reference in a contract to any document".[5] Article 7 also provides for another option where it defines the arbitration agreement in a manner that omits any form requirement.[6]

Article 8(1) of the Model Law places any court under an obligation to refer the parties to arbitration if the court is seized with a claim on the same subject-matter unless it finds that the arbitration agreement is null and void, inoperative or incapable of being performed.[7]

Furthermore, Article 9 establishes the compatibility between an interim measure issued by a domestic court and an arbitration agreement, by expressing the principle that any interim measures of protection that may be obtained from courts are compatible with an arbitration agreement.[8]

Arbitral Tribunal

Chapter III (Articles 10–15) of the Model Law contains detailed provisions ensuring a properly appointed arbitral tribunal is established to determine the dispute, ensuring that the competence and impartiality of arbitrators is appropriately protected.[9]

In accordance with the Model Law, an arbitral tribunal is required to reach a decision on the merits of the dispute in accordance with the rules of law chosen by the parties, or if necessary by the

4 Artide 7, Option I, UNCITRAL Model Law of International Commercial Arbitration.
5 Explanatory Note by the UNCITRAL secretariat on the 1985 Model Law on International Commercial Arbitration as amended in 2006, p. 28.
6 Artide 7, Option II, UNCITRAL Model Law of International Commercial Arbitration.
7 Explanatory Note by the UNCITRAL secretariat on the 1985 Model Law on International Commercial Arbitration as amended in 2006, p. 29.
8 Artide 9, UNCITRAL Model Law of International Commercial Arbitration.
9 UNCITRAL Model Law on International Commercial Arbitration Explanatory Documentation prepared for Commonwealth Jurisdictions, p. 5.

tribunal (Article 21), and to give reasons for its decision (Article 28). The tribunal cannot decide *ex aequo et bono* unless specifically authorised to do so.[10]

Article 16(1) of the Model Law adopts the two important principles of *"Kompetenz-Kompetenz"* and separability or autonomy of the arbitration clause. *"Kompetenz-Kompetenz"* is the power of the arbitral tribunal to independently rule on the question of whether it has jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement, without having to resort to a court, whereas the principle of separability states that an arbitration clause shall be treated as an agreement independent of the other terms of the contract.[11]

Conduct of Arbitral Proceedings

Chapter V provides the legal framework for a fair and effective conduct of the arbitral proceedings. Article 18 embodies the principle that the parties shall be treated with equality and be given a full opportunity of presenting their case and Article 19 guarantees the parties' freedom to agree on the procedure to be followed by the arbitral tribunal.[12]

Recognition and Enforcement of Awards

Chapter VIII of the Model Law provides for recognition and enforcement of arbitral awards, confirming to the rules provided under the New York Convention (see below). Under Article 35(1), any arbitral award, irrespective of the country in which it was made, shall be recognized as binding and enforceable, subject to the provisions of Article 35(2) and 36, which set forth the grounds on which recognition or enforcement may be refused.

2. New York Convention

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention") is one of the most important United Nations treaties in the area of international trade law and one of the key instruments in international arbitration.[13] The New York Conven-

10 Ibid, p. 5.
11 Explanatory Note by the UNCITRAL secretariat on the 1985 Model Law on International Commercial Arbitration as amended in 2006, p. 30.
12 Explanatory Note by the UNCITRAL secretariat on the 1985 Model Law on International Commercial Arbitration as amended in 2006, p. 32.
13 https://uncitral.un.org/en/texts/arbitration.

tion was adopted by the United Nations following a diplomatic conference held in May and June 1958[14] and entered into force on 7 June 1959.[15]

The New York Convention seeks to provide common legislative standards for the recognition of arbitration agreements and court recognition and enforcement of foreign and non-domestic arbitral awards. The term "non-domestic" embraces awards which, although made in the state of enforcement, are treated as "foreign" under its law because of some foreign element in the proceedings.

The New York Convention's principal aim is to oblige State Parties to ensure non-discrimination of foreign and non-domestic arbitral awards in a way that such awards are recognized and generally capable of enforcement in their jurisdiction in the same way as domestic awards. An ancillary aim of the New York Convention is to require courts of State Parties to give full effect to arbitration agreements by denying the parties access to court in breach of their agreement to refer the matter to an arbitral tribunal.[16]

As of January 2023, the New York Convention has 172 State Parties.

Key Provisions

The New York Convention applies to awards made in any State other than the State in which recognition and enforcement is sought. It also applies to awards "not considered as domestic awards".[17] When consenting to be bound by the New York Convention, a State may declare that it will apply the Convention (a) in respect to awards made only in the territory of another Contracting State and (b) only to legal relationships that are considered "commercial" under its domestic law.[18]

The New York Convention equally contains provisions on arbitration agreements. Article II (1) provides that Parties shall recognize written arbitration agreements. The central obligation imposed upon Parties by the New York Convention is to recognize arbitral awards as binding and enforce them if requested to do so.[19] A Contracting State would breach its obligations under the

14 United Nations, Treaty Series, vol. 330, No. 4739; UN DOC E/CONF.26/SR. 1-25, Summary Records of the United Nations Conference on International Commercial Arbitration, New York, 20 May – 10 June 1958.
15 New York Convention, Artide XII.
16 https://uncitral.un.org/en/texts/arbitration/conventions/foreign_arbitral_awards.
17 New York Convention, Artide I(1).
18 New York Convention, Artide I(3); North Macedonia dedared that it would apply the NYC only to differences arising out of legal relationships, whether contractual or not, that are considered commercial under its national law.
19 New York Convention, Artide III.

New York Convention by imposing stricter rules on recognition and enforcement of foreign arbitral awards than established therein.[20] The principle reflected in Article III stipulates discretion of the Contracting States to determine the applicable rules for recognition and enforcement so long as, in doing so, they do not impose "*substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards [...] than are imposed on the recognition or enforcement of domestic arbitral awards.*"

The New York Convention's pro-enforcement policy is also reflected in Article VII(1). Known as the "more favourable right" provision[21], article VII(1) states that, in addition to the New York Convention, a party seeking recognition and enforcement shall not be deprived of the right to rely on a more favourable domestic law or treaty. Under Article VII(1), a Contracting State will not be in breach of the New York Convention by enforcing arbitral awards and arbitration agreements pursuant to more liberal regimes than the New York Convention itself.[22]

The New York Convention requires simple formalities applicable to obtain recognition and enforcement of awards. The party seeking recognition and enforcement shall supply the relevant court with (a) the duly authenticated original award or a duly certified copy thereof; and (b) the original written arbitration agreement, or a duly certified copy thereof.[23]

The New York Convention defines five grounds upon which recognition and enforcement may be refused at the request of the party against whom it is invoked.[24] The grounds include (a) incapacity of the parties, invalidity of the arbitration agreement; (b) lack of due process; (c) the arbitral tribunal exceeded its authority under the arbitration agreement; (d) irregularity in the composition of the arbitral tribunal or the arbitral procedure; (e) setting aside or suspension of an award in the country in which, or under the law of which, that award was made.[25] The New York Convention defines two additional grounds upon which the court may *ex officio* refuse recognition and enforcement of an award. They are (a) non-arbitrability of the subject matter of the award and (b) the violation of public policy.[26]

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20 UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, p. 1.
21 UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, p. 2.
22 UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, p. 2.
23 New York Convention, artide IV.
24 New York Convention, artide V.
25 New York Convention, artide V(1).
26 New York Convention, artide V(2).

3. ICSID Convention

The Convention on the Settlement of Investment Disputes between States and Nationals of other States ("ICSID Convention") is a multilateral treaty formulated with the objective of promoting international investment. The International Centre for the Settlement of Investment Disputes (ICSID) is an independent, depoliticized and effective dispute-settlement institution. The ICSID Convention provides the framework for the conduct of arbitration proceeding dealing with investment cases. The main procedural provisions are contained in Chapters IV to VII of the Convention.

As stated in the Preamble, the goal of the ICSID Convention is to promote economic development through foreign investment. The availability of proper dispute resolution mechanisms is an important aspect of establishing a favourable legal framework for foreign investment.[27]

Jurisdiction and Domestic Courts

The Convention provides that the jurisdiction of ICSID extends to disputes arising directly out of an investment between a Contracting State and a national of another Contracting State, which the disputing parties consent in writing to submit to the Centre.[28] Parties must consent to the jurisdiction, either in an international treaty, in the host-State's law, or in a direct agreement between the investor and the State, after which a party may no longer resort to any other remedy.[29] Once consent to jurisdiction has been given, the investor's State of nationality loses its right to diplomatic protection against the host State.[30]

Furthermore, the Convention does not require the exhaustion of local remedies unless a State makes its consent subject to this condition.[31] Domestic courts are similarly barred from interfering in ICSID arbitration. Domestic courts have no authority to issue stay orders or intervene in ICSID proceedings in any way. Even provisional measures taken to preserve the rights of the parties pending the outcome of ICSID proceedings have to be recommended by the tribunal.[32]

Applicable Law

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27 *Schreuer*, p. 1.
28 ICSID Convention, Artide 25.
29 ICSID Convention, Artide 26.
30 ICSID Convention, Artide 27.
31 ICSID Convention, Artide 26.
32 ICSID Convention, Artide 47.

Since the ICSID Convention does not contain substantive rules but provides a procedure for the settlement of investment disputes, it contains a provision directing the tribunals primarily to decide in accordance with any choice of law made by the parties.[33] In the absence of an agreement on the applicable law, the tribunal may apply the host State's law and international law to the arbitral proceedings. With regard to the procedure, the Convention and the Arbitration Rules constitute the applicable law.[34]

Enforcement

The Convention also establishes a unique enforcement method. Awards must be recognized and enforced in all States Parties in the same way as final domestic court decisions.[35] ICSID awards have a particular advantage over other foreign or international arbitral awards because of this aspect of the Convention.

The ICSID Convention provides for an almost automatic enforcement method that does not require any review of the award by domestic courts during the enforcement stage. Each Contracting State has the responsibility to recognize and enforce ICSID awards.

Annulment

Under the Convention, an *ad hoc* committee may annul the award upon request of a party. Article 52 ICSID Convention provides for an exhaustive list of grounds available for annulment of an award as[36]

a) that the Tribunal was not properly constituted;

b) that the Tribunal has manifestly exceeded its powers;

c) that there was corruption on the part of a member of the Tribunal;

d) that there has been a serious departure from a fundamental rule of procedure; or

e) that the award has failed to state the reasons on which it is based.

33 ICSID Convention, Artide 42(1).
34 ICSID Convention, Artide 44.
35 ICSID Convention, Artide 54.
36 ICSID Convention, Artide 52(1).

4. ICSID Additional Facility Rules

The ICSID Additional Facility Rules, which "*authorize the Secretariat to administer certain disputes falling outside the scope of the ICSID Convention*", were enacted in 1978.[37] These cover

- fact-finding proceedings;
- conciliation or arbitration proceedings for the settlement of investment disputes between parties one of which is not a Contracting State or a national of a Contracting State; and
- arbitration or conciliation proceedings between parties at least one of which is a Contracting State or a national of a Contracting State for the settlement of disputes that do not arise directly out of an investment, provided that the underlying transaction is not an ordinary commercial transaction.

5. ICC Rules of Arbitration

The ICC Rules of Arbitration refer to the set of procedural rules that govern the conduct of arbitration proceedings administered by the International Chamber of Commerce (ICC). The ICC is one of the world's leading institutions for the resolution of international commercial disputes through arbitration.

The ICC Rules of Arbitration provide a comprehensive framework for the resolution of disputes through arbitration, covering all aspects of the arbitration process, including the appointment of arbitrators, the conduct of proceedings, the presentation of evidence, and the rendering of awards. The first version of these rules was adopted in 1922, and subsequent revisions were made in 1927, 1942, 1955, 1988, 1998, 2012 and most recently in 2021.

Some of the key features of the ICC Rules of Arbitration include:

- Appointment of arbitrators: The ICC maintains a database of qualified arbitrators from around the world, and the rules provide a process for their appointment to a particular case.
- Conduct of proceedings: The rules set out procedures for initiating and conducting arbitration proceedings, including the exchange of written submissions, the holding of hearings, and the presentation of evidence.

[37] ICSID Additional Facility Rules, Resources, International Centre for Settlement of Investment Disputes, at: https://icsid.worldbank.org/resources/rules-and-regulations/additional-facility-rules/overview.

- Award: The rules provide for the issuance of a written award by the arbitrator(s), which is binding on the disputing parties and enforceable in courts around the world.
- Costs: The rules establish a fee schedule for the arbitration proceedings and provide for the allocation of costs between the parties.

Overall, the ICC Rules of Arbitration are designed to ensure a fair and efficient process for resolving international commercial disputes through arbitration. They are widely recognized as a leading set of arbitration rules and are frequently used in complex international disputes. The most recent update to the ICC Rules of Arbitration was published on 1 January 2021 and introduced several changes aimed at enhancing the efficiency, transparency, and flexibility of ICC arbitration proceedings.[38] These changes include the introduction of new provisions on the use of technology in arbitration, the appointment of an emergency arbitrator, and the consolidation of multiple arbitrations.

6. IBA Rules and Guidelines

The International Bar Association ("IBA") has a set of rules and principles for international arbitration that are intended to shorten the arbitral process and make international arbitration more accessible as a means of alternate dispute settlement. While the IBA's many sets of rules and principles for international arbitration are not legally binding, they have become generally regarded as an expression of best practices by the international arbitration community. As a result, they serve as a useful guide for all international arbitration participants, including national courts. They are intended to aid participants, such as parties, counsel, arbitrators, arbitral institutions, and national courts, in dealing with important issues that occur during the course of an international arbitration proceeding, such as the taking of evidence, conflicts of interest and the impartiality and independence of arbitrators, the ethics of arbitrators, party representation and the drafting of arbitration clauses.

[38] ICC, Arbitration Rules, https://iccwbo.org/content/uploads/sites/3/2020/12/icc-2021-arbitration-rules-2014-mediation-rules-english-version.pdf, p.1

(a) IBA Guidelines on Conflicts of Interest in International Arbitration (2014)

Since their publication in 2004, the IBA Guidelines on Conflicts of Interest in International Arbitration have been a major soft law instrument in giving guidance regarding the scope of arbitrators' disclosure requirements and conflict of interest issues in international arbitration. They were amended in August 2015. They focus on when an arbitrator should disclose potential conflicts, as well as when he or she should not accept appointment in the first place.[39] These Guidelines are based on statutes and case law from a variety of jurisdictions, as well as the judgment and experience of practitioners active in international arbitration.[40]

Part I of the Guidelines on Conflicts of Interest contains "General Standards" regarding impartiality, independence, and disclosure, as well as "Explanatory Notes" on those Standards, whereas Part II, entitled Practical Application of the General Standards, is divided into the Red List, the Orange List, and the Green List (collectively called the "Application Lists"), which contain specific, non-exhaustive scenarios that are likely to occur in arbitration violating the conflict of interest rules.

(b) IBA Rules on the Taking of Evidence in International Arbitration (2020)

The IBA Rules on Taking of Evidence aim to "*provide an efficient, economical, and fair process for taking of evidence in international arbitrations, particularly those between parties from different legal traditions*," as stated in the Preamble, and "*to supplement the legal provisions and institutional, ad hoc, or other rules that apply to the conduct of the arbitration*".[41] It further aims to provide the parties discretion in adopting the rules in whole or in part to govern proceedings or to use them as guidelines to establish their own procedures.[42]

There are nine articles in the concerned rules, which deal with documents (Article 3), fact witnesses (Article 4), experts (Articles 5-6), evidentiary hearings (Article 8), and the admissibility and assessment of evidence (Article 9), among other things. Additionally the updated rules also pro-

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39 See on this, *Moses*, The Role of the IBA Guidelines on Conflicts of Interest in Arbitrator Challenges, available at: http://arbitrationblog.kluwerarbitration.com/2017/11/23/role-iba-guidelines-conflicts-interest-arbitrator-challenges/ (14/04/2023).

40 IBA Guidelines on Conflicts of Interest in International Arbitration, Introduction, para. 4.

41 IBA Rules on the Taking of Evidence in International Arbitration, Preamble, para. 1.

42 IBA Rules on the Taking of Evidence in International Arbitration, Preamble, para. 2.

vide for a possibility of a virtual hearing,[43] and provisions that expressly empower the tribunal to exclude illegally obtained evidence.[44]

7. Prague Rules

The Rules on the Efficient Conduct of Proceedings in International Arbitration ("Prague Rules 2018")[45] were developed as an alternative to the IBA Rules on Taking of Evidence. A key goal of the authors of the Prague Rules was to encourage and provide the power for tribunals to take a more active role in procedural management of cases with the aim of reducing time and costs of the proceedings. According to the authors of the Prague Rules there are two features that clearly differentiate them from the IBA Rules on Taking of Evidence: 1) a focus on "*avoid[ing] extensive production of documents, including any form of e-discovery*"; 2) an opportunity for the tribunal to play a role in the parties' efforts aimed at reaching an amicable settlement.

The Prague Rules consist of 12 articles providing rules, *inter alia* for the proactive role of the arbitral tribunal (Article 2), fact finding and documentary evidence (Articles 3–4), fact witness and experts (Article 5–6), application of the principle *iura novit curia* (Article 7), and tribunal's assistance in amicable settlement (Article 12).

8. The Role of National Courts in International Arbitration

International Arbitration does not operate in a legal vacuum. The seat of the arbitration determines the legal domicile of the arbitration and thus the state courts that may be called upon to intervene. The UNCITRAL Model Law provides for the principle of minimum court intervention in Article 5. However, the involvement of domestic courts remains essential for the effectiveness of international arbitral proceedings. In general, the role of domestic courts is one of assistance (e.g. in the taking of evidence) and of supervision (e.g. policing due process). They may intervene at different stages of the arbitration, including:

- Enforcing arbitration agreements: National courts may be called upon to enforce an arbitration agreement if one of the parties is not willing to participate in the arbitration process. This may involve compelling a party to participate in the arbitration or granting an

43 IBA Rules on the Taking of Evidence in International Arbitration, Artide 8.2.
44 IBA Rules on the Taking of Evidence in International Arbitration, Artide 9.3.
45 https://praguerules.com/upload/medialibrary/9dc/9dc31ba7799e26473d92961d926948c9.pdf (14/04/2023).

anti-suit injunction to prevent a party from pursuing court proceedings in another jurisdiction in violation of the arbitration agreement.

- Appointing arbitrators: If the parties are unable to agree on the composition of the arbitration tribunal, national courts may be called upon to appoint arbitrators.
- Providing interim relief: National courts may be asked to provide interim relief before an arbitration tribunal is established or during the arbitration process. This may include granting an injunction, freezing assets, or preserving evidence.
- Setting aside or enforcing awards: National courts may be asked to set aside or annul an arbitration award in certain circumstances, such as if the award was obtained through fraud or corruption. Conversely, national courts may also be asked to enforce an arbitration award, which can include recognition of the award and the provision of enforcement measures.
- Clarifying procedural or substantive issues: National courts may also be called upon to clarify procedural or substantive issues that may arise during the arbitration process, such as the scope of the arbitration agreement or the interpretation of applicable law.

Overall, the role of national courts is to support and facilitate the arbitration process while ensuring that the rights of the parties are protected and that the decisions of the arbitral tribunal are enforceable. Therefore, a well-functioning domestic court system is important for the effectiveness of international arbitration as such.

9. Recent Trends and Developments

a) Use of Remote Hearings

The Covid-19 pandemic accelerated the use of remote hearings by arbitration institutions. At the beginning of the pandemic most arbitration rules did not specifically provide for the possibility of conducting remote (online) hearings. However, the leading arbitration institutions, such as the International Chamber of Commerce (ICC), the Stockholm Chamber of Commerce (SCC) and Hong Kong International Arbitration Centre (HKIAC) promptly released numerous guidelines that cover main issues related to remote hearings.[46] Moreover, non-institutional guidelines and protocols, such as the Seoul Protocol on Video Conferencing in International Arbitration,[47] the

[46] See https://iccwbo.org/publication/icc-guidance-note-on-possible-measures-aimed-at-mitigating-the-effects-of-the-covid-19-pandemic/; and https://sccinstitute.com/about-the-scc/news/2020/covid-19-information-and-guidance-in-scc-arbitrations/ (14/04/2023).

[47] https://sccinstitute.com/media/1708389/seoul-protocol.pdf (14/04/2023).

CIArb Guidance Note on Remote Dispute Resolution Proceedings,[48] and the Practical Law Draft Procedural Order for Video Conference Arbitration Hearings,[49] were released.

Recently, arbitration institutions updated their rules to specifically provide for the use of remote hearings. For example, such possibility is now reflected in the 2020 LCIA Rules or in the 2021 ICC Rules.

b) Transition to Greener Arbitration

In light of the current climate crisis, arbitration institutions are trying to make arbitration more environment-friendly. A first measure in that regard is the refusal of hard copies of case materials to be submitted. Arbitration institutions incorporate electronic platforms for submission of written pleadings, exhibits, and communications between the parties. Furthermore, the use of such platforms is contributing to effective case management, the reduction of costs, and the security of the proceedings. For example, proceedings under the aegis of the SCC are conducted with the use of the SCC Platform, which could also be used in *ad hoc* proceedings. Similar platforms are used for example by the Vienna International Arbitral Centre (VIAC), the London Court for International Arbitration (LCIA) and the ICSID.

Furthermore, the Campaign for Greener Arbitrations developed green protocols for arbitration users, where specific measures that could reduce the negative impacts of arbitration proceedings for the environment, are listed.

c) Expedited Procedures

There is equally a tendency to establish more time and cost efficient arbitration proceedings. To that purpose, the leading institutions try to adapt existing mechanisms and develop new ones to respond to this demand by arbitration users.

In general, arbitration institutions offer such mechanisms as, for example, expedited proceedings (fast-track proceedings for relatively small valued disputes), early dismissal of meritless claims, and emergency arbitration (where an arbitrator is appointed before the tribunal is constituted to decide requests for urgent provisional measures).

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48 https://www.ciarb.org/media/9013/remote-hearings-guidance-note_final_140420.pdf (14/04/2023).

49 https://uk.practicallaw.thomsonreuters.com/w-025-0244?view=hidealldraftingnotes&transitionType=Default&contextData=%28sc.Default%29 (14/04/2023).

In an expedited arbitration procedure, the parties may submit a limited number of petitions and shorter deadlines are applied in the expedited procedure than in the procedure under the ordinary arbitration rules. For example, an expedited arbitration procedure administered by the SCC requires that the parties have agreed that the dispute shall be resolved by arbitration under the SCC Rules for Expedited Arbitration.[50] An arbitrator under this procedure must render the award in 3 months.[51] There are no limits as to the value of the dispute which could be considered under the expedited procedure.

A similar expedited procedure is implemented under the VIAC Rules, under which the arbitrator shall render the award within 6 months.[52] Under the 2021 ICC Rules, the expedited arbitration procedure applies automatically to disputes, whose amount does not exceed USD 2 million or USD 3 million depending on the date of the arbitration agreement.[53]

Many arbitration rules allow arbitrators to dismiss manifestly unmeritorious claims early on. For example, under the SCC Rules the SCC Board dismisses a case if the SCC manifestly lacks jurisdiction.[54] The SCC Rules also provide for a summary procedure, under which a party may request that the tribunal decides one or more issues of fact or law without necessarily undertaking every procedural step that might otherwise be adopted within the proceedings. The request for summary procedure may include, for example, the assertion that an allegation of fact or law material to the outcome of the case is manifestly unsustainable.[55]

In 2021, the SCC has introduced a procedure called "SCC Express" – a fast and simple way to get a neutral, legal assessment of the disputed matter. Under this procedure, a neutral legal expert provides a legal assessment of the dispute within 3 weeks. The findings of the assessment include the position and reasoning of the neutral legal expert on the issues presented by the parties. The parties can agree to make their assessment contractually binding or to use the non-binding findings to guide settlement discussions or other ways forward.

In arbitrations administered by the ICC, the arbitrators could consider the parties' requests for the expeditious determination of manifestly unmeritorious claims or defenses within the broad scope of Article 22 of the ICC Rules (Conduct of the Arbitration).[56] In a similar way, the parties

50 Preamble to the 2017 SCC Rules for Expedited Arbitration.
51 Artide 43 of the 2017 SCC Rules for Expedited Arbitration.
52 Artide 45 of the 2021 VIAC Rules of Arbitration and Mediation.
53 Artide 30 of the ICC Rules.
54 Artide 12 of the SCC Rules.
55 Artide 39 of the SCC Rules.
56 Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration, 2021, p. 16.

could file an objection that a claim is manifestly without legal merit under the ICSID Arbitration Rules.[57]

The 2020 LCIA Rules introduced the tribunal's express power for an early determination of the dispute to encourage the dismissal of proceedings without merits. The tribunal has the power to determine that any claim, defense, counterclaim, cross-claim, defense to counterclaim or defense to cross-claim is manifestly outside the jurisdiction of the arbitral tribunal, is inadmissible or manifestly without merit. Where appropriate, the tribunal may issue an order or award to that effect.[58]

d) Multi-Party Procedures

Arbitral institutions are also trying to ensure more flexibility in considering complex disputes by expanding provisions of their rules on consolidation of cases and joinder of third parties.

Provisions on consolidation of cases and joinder of third parties are stipulated, for example, in the SCC Rules[59], the VIAC Rules[60], and the LCIA Rules[61]. These rules establish different requirements for the consolidation of cases. Under the SCC Rules, consolidation is possible when there is an agreement of the parties, when all the claims are made under the same arbitration agreement or when the relief sought arises from the same transaction or series of transactions.[62] Under the VIAC Rules, cases can be consolidated if there is an agreement of the parties, the same arbitrator(s) were appointed and the place of arbitration is the same.[63]

The 2021 ICC Rules allow consolidation of the proceedings between the same parties but under different arbitration agreements, when the disputes arise in connection with the same legal relationship, and the International Court of Arbitration finds the arbitration agreements to be compatible.[64] Furthermore, the 2021 ICC Rules have introduced an exception to the rule requiring unanimous consent for the joinder of additional parties after the confirmation or appointment of the arbitrator.[65]

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57 Rule 41(5) of the ICSID Arbitration Rules.
58 Artide 22(viii) of the LCIA Rules.
59 Artides 13 and 15 of the SCC Rules.
60 Artides 14 and 15 of the VIAC Rules.
61 Artides 22.1 and 22A of the LCIA Rules.
62 Artide 15 of the SCC Rules.
63 Artide 15 of the VIAC Rules.
64 Artide 10 of the ICC Rules.
65 Artide 7 of the ICC Rules.

e) Third-Party Funding and Greater Transparency

Third-party funding is a rapidly developing trend in international arbitration. To avoid potential conflicts of interest, numerous arbitral institutions are adapting their rules accordingly.

In this regard, the SCC adopted a policy encouraging the parties to disclose any third party with a significant interest in the outcome of the dispute, including funders, parent companies, and ultimate beneficial owners.[66]

Under the amended 2021 ICC Rules, each party must promptly inform the secretariat, the arbitral tribunal and the other parties of the existence and identity of any non-party which has entered into an arrangement for the funding of claims or defenses.[67] Specific provisions on the disclosure of third-party funding arrangements are also stipulated in the newly developed 2021 VIAC Rules on Investment Arbitration and Mediation.[68]

The recently amended ICSID Rules (July 2022) provide for an obligation of the parties to submit a notice of third-party funding to the Secretary-General of the ICSID with details of the funder, including names and addresses. If a funding party is a legal entity, the notice shall include the names of the persons and entities that own and control the legal entity.[69]

II. Mediation

1. Mediation Rules

The first attempt at universal harmonization in the area of cross-border mediation resulted in the UNCITRAL Conciliation Rules of 1980[70], which are a set of procedural rules upon which parties may agree for the conduct of mediation. Subsequently, UNCITRAL embarked on the development of a Model Law to provide for a legislative basis. This endeavour resulted in the adoption of the UNCITRAL Model Law on International Commercial Conciliation in 2002. The Model Law covers the whole mediation procedure, including the commencement, the number and appointment of mediators, and the conduct of the mediation, among others.[71] The Model Law was amended in 2018 and now also includes a section on enforcement.

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66 https://sccinstitute.com/media/1035074/scc-policy-re-third-party-interests-adopted.pdf (14/04/2023).
67 Artide 11.7 of the ICC Rules.
68 Artide 13a of the 2021 VIAC Rules on Investment Arbitration and Mediation.
69 Rule 14 of the amended ICSID Arbitration Rules.
70 UNCITRAL Conciliation Rules (1980), Official Records of the General Assembly, Thirty-fifth Session, Supplement No. 17 (A/35/17).
71 *Knieper,* p. 393.

(a) UNCITRAL Mediation Rules

In 2021, the UNCITRAL Mediation Rules, which are based on the 1980 UNCITRAL Conciliation Rules, were adopted. They have been aligned with both the Singapore Convention and the 2018 Model Law to constitute one comprehensive and coherent international framework for mediation. The UNCITRAL Mediation Rules apply, where parties have agreed to submit a dispute to mediation in accordance with them.[72] In line with the nature of mediation, Article 1(2) of the rules provides that the mediator shall not have the authority to impose upon the parties a solution to the dispute.

In accordance with Article 3(1) UNCITRAL Mediation Rules, there should be one mediator, unless otherwise agreed. Where there is more than one, the mediators should act jointly. Since one of the main characteristics of mediation is its flexibility, Article 4(1) UNCITRAL Mediation Rules stipulates that the parties may agree on the manner in which the mediation is to be conducted. In contrast to arbitration, it is allowed in mediation for the mediator to meet or communicate with the parties together or with each of them separately to reach an amicable settlement of the dispute.[73]

Ideally, the process is finished by an agreement on the terms of a settlement to resolve all or part of the dispute through mediation. The mediator may provide support to the parties in preparing the settlement agreement, if requested.[74] But the mediation may also terminate, if the parties declare it to be terminated or if they declare that they no longer wish to pursue mediation, or if the mediator declares that efforts a mediation are no longer justified, among others.[75]

(b) IBA Rules for Investor-State Mediation

The IBA Rules for Investor-State Mediation were adopted by a resolution of the IBA Council on 4 October 2012. The IBA State Mediation Subcommittee began its work in 2008 with an assessment of the specificities of investor-State disputes and an exploration of available alternatives to arbitration.[76] The Rules can be modified, amended or otherwise derogated from by agreement of the parties, since they work as voluntary default rules.

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72 Artide 1(1) UNCITRAL Mediation Rules.
73 Artide 5(1) UNCITRAL Mediation Rules.
74 Artide 8(1) UNCITRAL Mediation Rules.
75 See Artide 9 UNCITRAL Mediation Rules.
76 Anna Bret-Joubin and Barton Legum, A Set of Rules Dedicated to Investor-State Mediation: The IBA Investor-State Mediation Rules, ICSID Review 29(1), 2014, p. 17–24 (19).

Article 2 of the Rules provides for the commencement of the mediation process with minimal formalism. Mediation may be conducted in parallel with international arbitration or litigation before domestic courts. One of the main features of the Rules is the possibility of co-mediation, which is particularly useful in case of parties that do not speak the same language or do not come from the same legal tradition or cultural background. A pair of co-mediators may bridge the gap between them.[77] Similar to the UNCITRAL Rules, the mediation process can be terminated with an agreed settlement, by the decision of one of the parties to discontinue the mediation process or by the declaration of the mediator that no settlement will be possible.

(c) ICSID Mediation Rules

The ICSID (International Centre for Settlement of Investment Disputes) Mediation Rules provide a framework for parties to resolve investment disputes through mediation, which is a non-binding process facilitated by a neutral third-party mediator. The rules were newly established in 2022 and can be used independently of or together with arbitration proceedings. Mediation differs from conciliation at ICSID in different terms: Scope of application, mediation absent a prior written agreement, unilateral withdrawal at any time, mediator appointment and number, role of the mediator, no jurisdictional termination by the mediator, more informal process, mediation is confidential unless the party agree differently.[78]

The ICSID Mediation Rules establish procedures for the initiation of mediation, the appointment of a mediator, the conduct of the mediation process, and the termination of the mediation. Some of the key provisions of the ICSID Mediation Rules include:

- Mediation is a voluntary process and can be initiated by either party to the dispute.
- The parties shall appoint one or two (co-mediator) mediators. Assistance is provided by the secretariat. (Chapter IV of mediation rules)
- The mediator is required to be impartial and independent, and to maintain confidentiality throughout the mediation process. (Rule 10 and 17 of mediation rules)
- The mediator has the authority to conduct the mediation in a manner that he or she considers appropriate, and the parties are required to act in good faith throughout the mediation process. (Chapter V of mediation rules)

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77 Ibid, p. 22.

78 See https://icsid.worldbank.org/rules-regulations/mediation/key-differences-between-mediation-and-conciliation (18/04/2023).

- If a settlement is reached, the parties are required to sign a written settlement agreement, which can be incorporated into a tribunal award according to Rule 43 (2) of the ICSID Arbitration rules.
- If the parties do not reach a settlement through mediation, either party may proceed with arbitration under the ICSID Convention.

Overall, the ICSID Mediation Rules provide a flexible and efficient means of resolving investment disputes through a non-binding, confidential process, which may help parties to avoid the time, cost, and uncertainty associated with traditional arbitration proceedings.

(d) UNCITRAL Working Group III

At UNCITRAL Working Group III, which is currently working on the reform of Investor-State Dispute Settlement (ISDS), there is growing consensus that the use of dispute resolution methods other than international arbitration should be encouraged in this field.[79] To that purpose, UNCITRAL Working Group III has focused its work on means to enhance the use of international mediation in investor-State dispute settlement (ISDS).[80] In particular, Working Group III is considering developing a new set of mediation rules for the context of ISDS. Another reform option is the development of model clauses to be included in investment treaties with the purpose of increasing the visibility of this ADR method for disputing parties. Finally, Working Group III considers the adoption of guidelines for the effective use of mediation. To that end, the UNCITRAL Secretariat has already prepared a set of Draft Guidelines, which are meant to encourage disputing parties to explore mediation and other ADR methods.[81]

2. Singapore Convention

The Singapore Convention on Mediation is an international treaty that was adopted by the United Nations General Assembly in 2018. The Convention provides an efficient and harmonised framework for the cross-border reliance on mediated settlement agreements. Under the Convention, an international mediated settlement agreement need not be transformed into another en-

79 EI-IILCC Study Group on ISDS Reform, Reform of Investor-State Dispute Settlement – Current State of Play at UNCITRAL, p. 23.

80 UNCITRAL Working Group III, Mediation and other Forms of Alternative Dispute Resolution (ADR) Note by the Secretariat.

81 EI-IILCC Study Group on ISDS Reform, Reform of Investor-State Dispute Settlement – Current State of Play at UNCITRAL, p. 24.

forceable instrument, such as a court judgment or an arbitral award before it can be relied upon before a court.[82]

The Convention has similarities with the New York Convention as it also aims to ensure that a settlement reached by the parties becomes binding and enforceable in accordance with a streamlined procedure.[83]

Applicability

The Convention applies to international settlement agreements resulting from mediation except for settlement agreements concluded to resolve a dispute arising from transactions by a consumer for personal, family or household purposes, or relating to family, inheritance or employment law. Settlement agreements that are enforceable as a judgment or as an arbitral award are also excluded from the scope of the Convention.[84]

The goal of this last exclusion is to minimize possible overlaps with existing and prospective conventions, such as the New York Convention, the Convention on Choice of Court Agreements (2005), and The Hague Conference on Private International Law's preliminary draft convention on judgements.[85]

Party obligation

Parties' obligations under the Convention include the enforcement of settlement agreements covered by the Convention and the ability of a disputing party to invoke a settlement agreement. Where the Convention does not impose any procedural requirements, each Party may establish the procedural methods that may be used.[86]

Grounds for refusal of relief

The grounds provided under the Convention may be grouped into three main categories:

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82 The Singapore Convention on Mediation: An Overview, 2 February 2021, available at: https://journal.arbitration.ru/analytics/the-singapore-convention-on-mediation-an-overview/ (14/04/2023).

83 *Sreenivasan Narayanan/Lim*, The singapore Convention on Mediation: A Primer, 25 July 2019, available at: https://www.klgates.com/The-Singapore-Convention-on-Mediation-A-Primer (14/04/2023).

84 Artide 1, Singapore Convention on Mediation.

85 Information brochure, *United Nations Convention on International Settlement Agreements Resulting from Mediation "Singapore Convention on Mediation"*, available at: https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/accession_kit_october_2019_website.pdf (14/04/2023).

86 Artide 3, Singapore Convention on Mediation.

- in relation to the parties and their incapacity;
- in relation to the settlement agreement, its invalidity, or if the settlement agreement is not final, not binding or has been subsequently modified, the obligations in the settlement agreement have been performed or are not clear and comprehensible, or if granting relief would be contrary to the terms of the settlement agreement;
- in relation to the mediation procedure, due process issues regarding the procedure or the independence and impartiality of the mediator.[87]

The Convention also provides for two additional grounds upon which a court may, on its own motion, refuse to grant relief. Those grounds relate to the fact that a dispute would not be capable of settlement by mediation or would be contrary to public policy.

Similar to the New York Convention, the Convention provides an exhaustive list of grounds under which a court may refuse to grant relief. Certain grounds were inspired by the New York Convention, such as incapacity of a party to the settlement agreement, if the settlement agreement was null and void, inoperative or incapable of being performed and if the settlement agreement was not binding.[88]

However, it was clear that the different contexts and characters of arbitration and mediation meant that there were grounds of refusal in the New York Convention that would not transfer easily. Examples are excess of authority and procedural irregularities.[89]

C. Developments under EU Law

I. Alternative Dispute Resolution

1. Commercial Arbitration

Even though over time EU law gradually entered numerous different fields of law, it has traditionally maintained a distance from private international law.[90] In fact, the Treaty governing the European Economic Community contemplated that any harmonization in the field of private international law would proceed outside the framework of EU law.[91] Only with the 1999 Treaty of Amsterdam, private international law was finally integrated into the first pillar of EU law, with

87 Information brochure, *United Nations Convention on International Settlement Agreements Resulting from Mediation "Singapore Convention on Mediation"*, available at https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/accession_kit_october_2019_website.pdf (14/04/2023).
88 Artide 5(1)(a), (1)(b)(i), (1)(b)(ii), Singapore Convention on Mediation.
89 *Morris-Sharma*, p. 136 f.
90 *Bermann*, p. 401.
91 Ibid.

the result that the 1968 Brussels Convention was transformed into Community legislation in form of Council Regulation 44/2001.

However, the Brussels Convention contained an express exclusion for jurisdiction and judgments in arbitration cases (Art. 1). This exclusion was also due to the fact that the 1958 New York Convention already addressed core issues governing the role of courts in relation to arbitration agreements and arbitral awards. This carve-out remained when the Convention was transformed into secondary EU legislation in 2001, and it still remains until today, also after the adoption of the recast Brussels I regulation in 2015.

At the same time, Recital 12 of the Brussels I Recast contains novel provisions on the arbitration exclusion. Accordingly, the first paragraph allows the courts of the Member States the liberty to rule on the existence and validity of arbitration agreements. The second paragraph excludes the decision of Member States' courts on the existence and validity of arbitration agreements from the rules of recognition and enforcement laid down in the Brussels I Recast. The third paragraph brings within the purview of the Brussels I Recast judgments of Member States' courts given on the substance of a dispute in cases where the arbitration agreement has been nullified. And the fourth paragraph excludes actions or ancillary proceedings relating to arbitration.

Yet, despite the clarifications introduced by the new recital 12, the Brussels I Recast does not resolve all questions concerning the arbitration/litigation interface, in particular the existence of parallel arbitration and court proceedings.[92] Moreover, arbitral tribunals lack standing under EU law to make preliminary references to the European Court of Justice (ECJ). The ECJ maintains the view that arbitral tribunals do not constitute "courts or tribunals of the Member States" within the meaning of Article 267 TFEU, thus excluding them from the preliminary reference procedure.

2. Investment Arbitration

(a) Delimitation of Competences

On 1 December 2009, with the entry into force of the Treaty of Lisbon, Foreign Direct Investment (FDI) became an exclusive competence of the EU. Even though in practice the EU already exercised this competence to a certain degree in the pre-Lisbon era, it was not until December 2009 that the EU began to develop a comprehensive EU investment policy on the basis of the

[92] *Chukwudi*, p. 7.

exclusive competence enshrined in Article 207(1) of the Treaty on the Functioning of the European Union (TFEU). That provision includes FDI among the subject matters of the EU's Common Commercial Policy (CCP). This means that the EU may institute its own negotiations of international investment agreements in lieu of the Member States, and the latter may only exercise this competence subject to the Commission's approval.

Thus far, the EU has employed its competence to negotiate a number of investment agreements (or investment chapters within broader Free Trade Agreements, FTAs) with some of its main trading partners, including Canada, China, Japan, Mexico, Singapore, Vietnam, and the UK. While some of the negotiations are still ongoing, the EU-Singapore[93] and EU-Vietnam[94] Investment Protection Agreements, as well as the EU-Canada CETA[95] have been concluded, and the EU reached an agreement in principle with Mexico. However, none of these agreements have entered into force nor is there any prospect of them entering into force any time soon.

This stagnation has been, to a large degree, owed to the delimitation of EU exclusive competences by the European Court of Justice (ECJ) regarding the notion of FDI in Article 207 TFEU. In its *Singapore-Opinion*,[96] the ECJ considered non-direct foreign investment and Investor-State Dispute Settlement (ISDS) to fall within the competences that are shared between the EU and its Member States.[97] In the light of this finding, the Council decided in May 2018 that investment agreements that deal with areas of shared competences will require the approval at the EU level and ratification at the national level.[98] That means that both the EU and all Member States must ratify EU investment agreements as so-called "mixed agreements" before they can become binding.

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93 See Council Decision (EU) 2018/1676 of 15 October 2018 on the signing on behalf of the EU of the Investment Protection Agreement between the EU and its Member States, of the one part, and the Republic of Singapore, of the other part, OJ L 279/1.

94 See Council Decision (EU) 2019/1096 of 25 June 2018 on the signing on behalf of the EU of the Investment Protection Agreement between the EU and its Member States, of the one part, and the Socialist Republic of Viet Nam, of the other part, OJ L 175/1.

95 Comprehensive Economic and Trade Agreement (CETA) between Canada, on the one part, and the European Union and its Member States, of the other part, OJ L 11/1.

96 ECJ, Opinion 2/15 of 16 May 2017, ECLI:EU:C:2017:376.

97 Ibid., paras. 238, 292 f. See also *Cremona*, p. 235 ff.

98 Council of the European Union, Conclusions on the negotiation and conclusion of EU trade agreements, 9120/18, 22 May 2018, https://data.consilium.europa.eu/doc/document/ST-9120-2018-INIT/en/pdf (16/04/2023), para 7.

(b) Shaping EU Investment Policy

In addition to this delimitation of competences, the ECJ approved in its *CETA-Opinion*[99] the investment policy that the EU institutions have been shaping since the entry into force of the Lisbon Treaty with a view towards establishing the EU as a global actor in the field of international investment.[100] Already in 2010, the Commission published a Communication exploring how the EU may develop an investment policy that increases EU competitiveness within the global context.[101] The Council and the European Parliament soon followed suit with similar statements. All three institutions have agreed that the EU should strive for strong – but also balanced – investment protection standards that take into account both the interests of private investors and host states' public policy goals.

In its CETA-Opinion, the ECJ found EU investment policy to be – in principle – compatible with EU Law. At the same time, the ECJ subjected EU investment policy to certain conditions arising out of the EU constitutional framework. In particular, an international agreement setting up its own judicial body, such as the Investment Court System (ICS) envisaged in the CETA, must meet a number of requirements. Accordingly, the ICS can neither (i) interpret and apply rules of EU law, nor (ii) affect the operation of the EU institutions, nor (iii) call into question the level of protection of public interest that led to the introduction of the challenged measure.[102]

If these conditions are fulfilled, an ISDS mechanism can be included in EU agreements. That way, the ECJ showed a way for the EU and its Member States to participate in ISDS on the external sphere. The assessment is, however, different, when it comes to the internal sphere – so-called intra-EU investment arbitration.

(c) Intra-EU Investment Arbitration

In 2004 and 2007, a number of Eastern European countries joined the European Union.[103] With their accession, many bilateral investment treaties (BITs) between "old" Member States and East-

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99 ECJ, Opinion 1/17 of the Court, 30 April 2019, ECLI:EU:C:2019:341.

100 *Bungenberg*, in: von Arnauld and Bungenberg (eds), p. 915.

101 European Commission, 'Towards a comprehensive European international investment policy', 7 July 2010, COM(2010) 343 final, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52010DC0343&from=EN (visited 15 August 2022) p. 2.

102 For more details, see *Riffel*, p. 1–19; *Schill*, in: Bungenberg et al (eds), p. 37–56; *Bungenberg* and *Titi*, 'CETA Opinion – Setting Conditions for the Future of ISDS', EJIL:Talk, 5 June 2019, CETA Opinion – Setting Conditions for the Future of ISDS – EJIL: Talk! (ejiltalk.org) (16/04/2023).

103 In 2004, Cyprus, Czechia, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia and Slovenia joined the EU. In 2007, Bulgaria and Romania acceded.

ern European countries concluded in the 1990s were automatically converted into so-called intra-EU BITs, ie agreements between two EU Member States. This development led to an augmented number of intra-EU arbitration, in which the respondent Member States – and often also the European Commission acting as *amicus curiae* – argued that intra-EU BITs had been superseded by EU law. Despite these objections, arbitral tribunals generally upheld their jurisdiction, rejecting the argument of an alleged incompatibility with EU law.

In one of these cases between a Dutch investor (*Achmea BV*) and the Slovak Republic, the ECJ was called upon to answer this very question as it was asked by the German Federal Court, which was involved in the setting aside procedure of the award rendered in these proceedings. What followed was a landmark decision rendered by the ECJ on 6 March 2018, in which it found that the arbitration clause contained in the Dutch-Slovak BIT was incompatible with EU law.[104] As a result of this judgment, 23 EU Member States concluded an agreement, which terminates upon their ratification all BITs between them.[105]

What results from the previous assessment is that if North Macedonia were to conclude a BIT with the EU/an EU Member State, the criteria laid down in the CETA Opinion must be followed. Since the ratification process of EU investment agreements is slow, North Macedonia could aim at concluding BITs with Member States directly. However, if North Macedonia were to accede the EU, these BITs with EU Member States (which would become intra-EU upon accession) would have to be terminated.

3. Mediation

The EU's objective of securing better access to justice aims to secure better access not only to the judicial system, but to the extrajudicial dispute resolution methods as well. Although mediation techniques have been used in Europe for many centuries, the institutionalisation of mediation as a mechanism of dispute resolution in EU Member States dates back only a few decades, in some cases only a few years.

In May 2008, the EU adopted the Directive 2008/52/EC of the European Parliament and of the Council on certain aspects of mediation in civil and commercial matters (hereinafter "Mediation Directive") to govern various mediation issues within EU Member States.

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

105 Agreement for the Termination of Bilateral Investment Treaties between the Member States of the European Union, SN/4656/2019/INIT, 29 May 2020, OJ L 169.

The objective of the Mediation Directive is to facilitate access to ADR and to promote the amicable settlement of disputes by encouraging the use of mediation and by ensuring a balanced relationship between mediation and judicial proceedings.[106] It applies in cross-border disputes, to civil and commercial matters, except as regards rights and obligations which are not at the parties' disposal under the relevant applicable law. It does not extend, in particular, to revenue, customs or administrative matters or to the liability of the State for acts and omissions in the exercise of State authority (*acta iure imperii*)[107].

The Mediation Directive has five main rules[108]: (i) it obliges each Member State to encourage the training of mediators and to ensure high quality of mediation; (ii) it gives every judge the right to invite the parties to a dispute to try mediation first if considered appropriate given the circumstances of the case; (iii) it provides that agreements resulting from mediation can be rendered enforceable if both parties so request; (iv) it ensures that mediation takes place in an atmosphere of confidentiality and that the mediator cannot be obliged to give evidence in court about what took place during mediation in a future dispute between the parties to that mediation; and (v) it guarantees that the parties will not lose their possibility to go to court as a result of the time spent in mediation: the time limits for bringing an action before the court are suspended during mediation. The Macedonian Mediation Act is fully harmonized with the Mediation Directive.

A 2014 assessment study of the impact of the Mediation Directive reveals significant variations in the implementation and results of promotion of mediation between Member States. Namely, it provides that despite the proven and multiple benefits, mediation in civil and commercial matters is used in less than 1% of the cases in the EU.[109]

A European Code of Conduct for Mediators has been developed by a group of stakeholders with the assistance of the services of the European Commission and was launched even before the

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106 See Artide 1 (1) of the European Mediation Directive.

107 See Artide 1 (2) of the European Mediation Directive.

108 As outlined on the official webpage of the European Union managed by the European Commission (https://e-justice.europa.eu/63/EN/eu_rules_on_mediation).

109 In the 2014 study 'Rebooting' The Mediation Directive: Assessing The Limited Impact of its Implementation and Proposing Measures to Increase the Number of Mediations in the EU, made upon request by the European Parliament's Committee on Legal Affairs and contributed to by 816 experts from all over the EU, it is found that although the Mediation Directive has undoubtedly helped to advance the mediation discourse across Europe and generated a genuine "ADR Movement" in the EU, it has not achieved its main objective, available at: https://www.europarl.europa.eu/RegData/etudes/etudes/join/2014/493042/IPOL-JURI_ET(2014)493042_EN.pdf (16/04/2023).

Mediation Directive, that is, at a conference in 2004 in Brussels. This code sets out a number of principles to which individual mediators can voluntarily decide to commit, under their own responsibility. Adherence to the European Code of Conduct for Mediators is specifically without prejudice to national legislation or rules regulating individual professions. The Code itself deals with the usual basic principles that one would expect: (i) independence and impartiality; (ii) the fairness of the process and the procedure; (iii) fees; (iv) confidentiality; and (v) enforcement of any settlements arrived at the conclusion of the mediation.[110]

II. General Status of European Accession Process of North Macedonia

1. Background

The road of the Republic of North Macedonia toward accession to the European Union has been very long and cumbersome. The country was identified as a potential candidate for EU membership during the European Council summit in Thessaloniki, Greece in 2003. The country signed the Stabilization and Association Act (hereafter SAA) in 2001, which came into force in 2004.

The Republic of North Macedonia applied for EU membership in 2004 and was granted candidate status by the European Council in December 2005. However, because of the naming dispute with Greece the country was faced with its first blockade on the path toward accession to the EU. Greece used its veto power to block the accession process. Regardless of this issue, the country was determined to continue its path of accession to the EU through the implementation of EU standards.

From 2009 to 2014 the country received six recommendations from the European Commission for the opening of accession negotiations. In 2015, the country entered a political crisis due to a wiretapping scandal. In June 2015, the European Commission presented "Urgent Reform Priorities" to address the underlying rule of law issues. To overcome the crisis, in the summer of 2015, the largest political parties signed the "Przino Agreement" which was mediated by the EU.

In the following years, North Macedonia stabilized and implemented the reforms which resulted in the grant of an unconditional recommendation for the opening of the accession negotiations by the European Commission in 2018.[111] In the summer of 2018, the "Prespa Agreement" was

[110] For more details, see *Kallipetis*, p. 65–73.

[111] Timeline of the membership status of Republic of North Macedonia, European Commission, European Neighborhood Policy and Enlargement Negotiations, available at: https://neighbourhood-enlargement.ec.europa.eu/enlargement-policy/north-macedonia_en (10/08/2022).

signed with Greece, thereby resolving the long-lasting naming dispute, removing the decade long blockade, and clearing the path towards accession.[112] After the agreement entered into force in 2019, the EU gave its formal approval to begin accession talks with North Macedonia in March 2020.

Unfortunately, in 2020 Bulgaria blocked the official start of North Macedonia's EU accession negotiations arguing for slow progress on the implementation of the Friendship Treaty signed between the countries in 2017. This move again effectively leaves the country in a deadlock situation for the unforeseeable future.

2. Implementation of the EU requirements

As already noted, the Republic of North Macedonia signed the SAA in 2001 and it came in force in 2004. The SAA is the main legal instrument which sets forth the conditions and requirements for EU accession. The SAA contains 128 articles, divided in 10 titles regulating the general principles of the agreement, political dialogue, regional cooperation, free movement of goods, workers, establishment, supply of services and capital, the approximations of law and law enforcement, justice and home affairs, cooperation policies, financial cooperation, and institutional, general, and final provisions.[113]

While the promotion of ADR is not explicitly mentioned in the text of the SAA, the importance of ADR mechanisms can be deduced from some of the obligations provided in the agreement. Article 68 provides that North Macedonia *"shall endeavor to ensure that its laws will be gradually made compatible with those of the Community"*.[114] Article 84 provides an obligation of the parties aimed at establishing a favorable climate for private investment, both domestic and foreign. In particular, the cooperation concerning investment is reflected through the following requirements:

- The improvement of North Macedonia's legal framework to favor and protect investment;
- The conclusion, where appropriate, with Member States of bilateral agreements for the promotion and protection of investment;
- The implementation of suitable arrangements for the transfer of capital; and

[112] Text of the Prespa Agreement, available at: https://vlada.mk/sites/default/files/dokumenti/spogodba-en.pdf (28/07/2022).

[113] Stabilization and Association Agreement between the European Communities and their Member States, of the one part, and the former Yugoslav Republic of Macedonia, of the other part (hereafter SAA), Brussels, 26 March 2001, text available at: https://neighbourhood-enlargement.ec.europa.eu/stabilisation-and-association-agreement-former-yugoslav-republic-macedonia-0_en (16/04/2023).

[114] SAA, Artide 68.

- The improvement of investment protection.[115]

The promotion of ADR goes in line with the requirement for improvement of the protection for investments and is an important prerequisite for the creation of a favorable climate for foreign investments.

In addition to the SAA, an important document that reflects the status of preparedness of the country with regard to EU standards is the yearly Country Report. Since 2011, the European Commission publishes these reports, tracking the progress in each of the 35 chapters of the *Acquis Communautaire*. So far, the EU Commission has published 11 reports, the last being published in October 2022. While the reports do not contain a specific chapter related to ADR, provisions, and requirements aimed at the improvement of the ADR mechanisms are scattered throughout several chapters.

3. Commercial Arbitration

The ADR mechanisms are generally analysed in Chapter 23 of the EU *acquis* – Judiciary and Fundamental Rights. However, the status of commercial arbitration has been analysed only superficially, and only in the latest five reports.

- **2018:** The report of 2018 acknowledges in a very broad manner that *"parties in disputes rarely resort to alternative dispute resolution, on which more awareness raising and promotion is required."*[116]
- **2019:** The report of 2019 is the first report which explicitly mentions arbitration as an ADR mechanism. According to the report *"efforts are needed to promote the use of alternative dispute resolution. Arbitration is still not considered as a viable tool to ensure justice, either by parties or by the courts"*.[117]
- **2020:** The report of 2020 again only reconfirms the findings of the previous reports by stating that *"efforts are needed to further promote the use of alternative dispute resolution, including through the relevant chambers"*.[118]

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115 SAA, Artide 84.

116 The former Yugoslav Republic of Macedonia 2018 Report, Strasbourg, 17 April 2018, SWD (2018) 154 final, p. 22, available at: https://neighbourhood-enlargement.ec.europa.eu/former-yugoslav-republic-macedonia-report-2018-0_en (16/04/2023).

117 North Macedonia 2019 Report, Brussels, 29 October 2019, SWD (2019) 218 final, p. 18, available at: https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/20190529-north-macedonia-report.pdf (16/04/2023).

118 North Macedonia 2020 Report, Brussels, 6 October 2020, SWD (2020) 351 final, p. 20, available at: https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/north_macedonia_report_2020.pdf. (16/04/2023).

- **2021:** The same can be concluded for the report of 2021, which established that *"permanent efforts are needed to promote the use of alternative dispute resolution including for commercial cases"*.[119]
- **2022:** Again, the same recommendation was repeated in the report of 2022:*"Work is needed to continuously promote mediation and the use of other alternative dispute resolution methods, including through the relevant chambers, the Academy for Judges and Prosecutors, and the Association of Judges"*.[120]

The key findings are that firstly, there is a low level of awareness of the existence of ADR mechanisms, including arbitration, and secondly, an effort should be made to promote the use of ADR by all relevant stakeholders.

4. Investment Arbitration

Foreign investment protection is generally analysed in Chapter 30 of the EU *acquis* – External Relations. However, the status of investment arbitration as an ADR method is not specifically analyzed, and the state of ADR in general and the efficiency of court dispute resolution is only briefly addressed in Chapter 23 (Judiciary and Fundamental Rights) and Chapter 24 (Justice, Freedom and Security) of the latest four reports, respectively.

- **2018:** The report of 2018 notes that *"the number of bilateral investment agreements (BITs) in force with third countries rose to 39, of which 19 are with EU Member States. The country should analyse all of these with regard to the need for their harmonisation with EU law"*.[121] There is no information that North Macedonia has complied with this recommendation and analysed the BITs it has concluded with regard to the their harmonization with EU law. Relating to the resolution of disputes arising out of investments, it is acknowledged in the 2018 report that *"it is still the case that parties in disputes rarely resort to alternative dispute resolution, on which more awareness raising and promotion is required"*[122] and that *"resolving a commercial dispute through a court is time-consuming and costly"*.[123]
- **2019**: The report of 2019 also notes the number of bilateral investment agreements, mentioning that *"the number of bilateral investment agreements (BITs) remained at 39, of which 20 are*

[119] North Macedonia 2021 Report, Brussels, 19 October 2021, SWD (2021) 294 final, p. 20, available at: https://ec.europa.eu/neighbourhood-enlargement/north-macedonia-report-2021_e (16/04/2023).
[120] North Macedonia 2022 Report, Brussels, 12 October 2022, SWD (2022) 337 final, p. 19, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52022SC0337 (16/04/2023).
[121] The former Yugoslav Republic of Macedonia 2018 Report, Strasbourg, 17 April 2018, SWD (2018) 154 final, p. 84, available at: https://neighbourhood-enlargement.ec.europa.eu/former-yugoslav-republic-macedonia-report-2018-0_en (16/04/2023).
[122] Ibid., p. 22.
[123] Ibid., p. 46.

with EU Member States".[124] The report again emphasizes that *"efforts are needed to promote the use of alternative dispute resolution. Arbitration is still not considered as a viable tool to ensure justice, either by parties or by the courts".*[125]

- **2020**: The report of 2020 repeats the conclusions from previous reports that *"resolving a commercial dispute through a court is time-consuming and costly".*[126] With regard to the further development of investment treaty protection, the report states that *"within the framework of REA (Regional Economic Area), standards on investment at regional level still need to be adopted to reflect the latest EU policy developments, which will be used when negotiating investment treaties with third countries and reflected in the Bilateral Investment Treaty (BIT) template under preparation".*[127]
- **2021**: The report of 2021 notes the new development with respect to investment treaty protections in the following terms: *"39 bilateral agreements with third countries (BITs) are in force (the agreement with India was terminated), of which 19 are with EU Member States. An investment protection agreement was signed with the United Arab Emirates. An Agreement on partnership, trade and cooperation was signed with the United Kingdom of Great Britain and Northern Ireland. The country is working on updating the existing model agreement for BITs".*[128]
- **2022**: The report of 2022 only briefly mentions that work is needed to promote alternative dispute resolution methods and does not address investment treaty protection.[129]

In sum, the reports note the bilateral investment agreements North Macedonia has concluded and its efforts to the most recent couple of years of developing its investment treaty framework. Investment treaty protection will be especially important for foreign investors considering the findings in the report that dispute resolution through a court is time-consuming, costly and often unsatisfactory.

5. Mediation

[124] North Macedonia 2019 Report, Brussels, 29 May 2019, SWD (2019) 218 final, p. 94, available at: https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/20190529-north-macedonia-report.pdf (16/04/2023).

[125] Ibid., p. 18.

[126] North Macedonia 2020 Report, Brussels, 6 October 2020, SWD (2020) 351 final, p. 51, available at: https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/north_macedonia_report_2020.pdf. (16/04/2023).

[127] Ibid., p. 97.

[128] North Macedonia 2021 Report, Brussels, 19 October 2021, SWD (2021) 294 final, p. 103, available at: https://ec.europa.eu/neighbourhood-enlargement/north-macedonia-report-2021_e (16/04/2023).

[129] North Macedonia 2022 Report, Brussels, 12 October 2022, SWD (2022) 337 final, available at: https://neighbourhood-enlargement.ec.europa.eu/system/files/2022-10/North%20Macedonia%20Report%202022.pdf (16/04/2023).

The status of mediation in the country, as one of the ADR mechanisms, has been analysed in the latest four reports, as provided in point 2 – Commercial Arbitration – with the general view being that better promotion and raising the awareness for the use ADR mechanisms is needed. In addition, the reports refer to mediation with the following findings:

- **2018:** The report of 2018 refers to mediation from the aspect of consumer protection and finds that *"the mediation scheme remains prohibitively expensive for consumers".* [130]
- **2020:** The report of 2020 also notes that *"the number of mediation cases has decreased over recent years, notably as regards labour disputes".*[131] In addition, regarding mediation in consumer protection, the report shows that "*the mediation scheme is still expensive and difficult for consumers to access".*[132]
- **2021:** The report of 2021 notes positive developments for mediation by referencing that *"in 2020, the number of mediation cases rose by 55% compared to 2019*". [133] However, it still finds that *"the mediation scheme continues to be expensive and difficult for consumers to access".*
- **2022:** The report of 2022 mentions the introduction of the new Mediation Act. It further provides that *"work is needed to continuously promote mediation and the use of other alternative dispute resolution methods, including through the relevant chambers, the Academy for Judges and Prosecutors and the Association of Judges".* It also reconffirms that *"The mediation scheme continues to be expensive and difficult for consumers to access".*[134]

D. National Legal Framework

I. Germany

1. Judicial System

[130] The former Yugoslav Republic of Macedonia 2018 Report, Strasbourg, 17 April 2018, SWD (2018) 154 final, p. 80, available at: https://neighbourhood-enlargement.ec.europa.eu/former-yugoslav-republic-macedonia-report-2018-0_en (16/04/2023).

[131] North Macedonia 2020 Report, Brussels, 6 October 2020, SWD (2020) 351 final, p. 51, available at: https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/north_macedonia_report_2020.pdf. (16/04/2023).

[132] Ibid., p. 94.

[133] North Macedonia 2021 Report, Brussels, 19 October 2021, SWD (2021) 294 final, p. 20, available at: https://ec.europa.eu/neighbourhood-enlargement/north-macedonia-report-2021_e (16/04/2023).

[134] North Macedonia 2022 Report, Brussels, 12 October 2022 SWD (2022) 337 final, p. 19 available at: https://neighbourhood-enlargement.ec.europa.eu/system/files/2022-10/North%20Macedonia%20Report%202022.pdf (16/04/2023).

(a) The Court System

Germany is a federal state. It follows that the court system is also structured federally. Jurisdiction is exercised by the courts of the 16 federal states (*Länder*) and by federal courts. In addition, according to the Basic Law for the Federal Republic of Germany (*Grundgesetz – GG*) there is the Federal Constitutional Court – which is the highest court in the Federal Republic – and five supreme federal courts at federal level.[135] These are above the courts of the Länder in the hierarchy.

Generally, the German court system is divided into five distinct jurisdictional branches (*Gerichtsbarkeiten*). One of them are the so-called "ordinary" courts (*ordentliche Gerichtsbarkeit*) which are competent in civil and commercial matters, as well as in criminal matters. The other jurisdictional branches are the administrative courts, and the more specialised labour courts, fiscal courts, and social courts. In principle, the courts in each of these jurisdictional branches have exclusive jurisdiction for disputes falling within their competence.

The civil court system is part of the "ordinary" jurisdiction. The German civil procedure provides for three instances. The first instance is either the Local Court (*Amtsgericht*) or the Regional Court (*Landgericht*). Which of them has jurisdiction for a dispute is governed in §§ 23, 71 of the Courts Constitution Act (*Gerichtsverfassungsgesetz – GVG*) and depends mainly on the value of the matter in dispute. The Local Courts have jurisdiction over matters up to a value of 5,000 Euro. In addition, the Local Courts have some special jurisdictions irrespective of the value of the matter in dispute, e.g. over disputes concerning claims arising out of a lease of living accommodation or matters of family law. The Regional Courts have jurisdiction over all other entry-level matters, but with some exceptions. Also, the Higher Regional Court (*Oberlandesgericht*) has entry-level jurisdiction, but only for certain special matters, e.g. the recognition and enforcement of domestic and foreign arbitral awards.

The second instance is at the same time the first appellate level (*Berufung*), which is seated either at the Regional Court or at the Higher Regional Court. If the District Court has jurisdiction in the first instance, the second instance is located at the Regional Court and if the Regional Court has jurisdiction in the first instance, the second instance is located at the Higher Regional Court. Judgments of courts of the first instance may be appealed on issues of fact or law (§§ 511, 513(1) Code of Civil Procedure, *Zivilprozessordnung – ZPO*).

The third instance is the second appellate level (*Revision*), over which the Federal Court of Justice (*Bundesgerichtshof – BGH*) has jurisdiction. Final judgments delivered by the second instance may

[135] Art. 92 GG.

only be appealed on the ground that the contested decision is based on a violation of the law (§§ 542(1), 545(1) ZPO). Under certain circumstances a jump appeal (*Sprungrevision*) is possible.

Finally, the German court system includes several specialised courts. Most of them are located at the ordinary courts. Examples are family courts dealing with marriage law, law on the parent and child relationship etc. or commercial courts as specialised courts for commercial disputes.

The administrative jurisdiction which is also one of the distinct jurisdictional branches (*Gerichtsbarkeiten*) deals with disputes under public law. However, the administrative courts are not competent for constitutional disputes. Such disputes occur, for example, when constitutional organs argue over constitutional law, e.g. the parliament and the government. The decision on such cases is reserved for the Federal Constitutional Court. The administrative court system, like the civil court system, provides for three instances. In addition to the administrative courts, each *Bundesland* has a higher administrative court. The highest instance is the Federal Administrative Court which is located in Leipzig. In most cases, the administrative courts have first-instance jurisdiction. For appeals against their decisions, the higher administrative courts are responsible as the second instance. In addition, there are certain cases that require the higher administrative courts to have jurisdiction in the first instance. The Federal Administrative Court has jurisdiction as the second appellate instance (*Revision*) for appeals against judgements of the higher administrative court and, in exceptional cases, for jump appeals against judgements of the administrative courts. But even this court can have jurisdiction at first instance in special cases. [136]

(b) Civil Proceedings

It is possible to subdivide civil proceedings into the following main stages. Before the commencement of a proceeding the claimant has to weigh up its chances of success and to evaluate its risks, especially regarding the costs. After balancing the pros and cons the claimant will submit its claim to the court. The court will then deliver the statement of claim to the respondent and the complaint is considered pending (*rechtshängig*) which triggers procedural and substantive legal consequences. Before starting the oral proceedings, the ZPO offers the possibility to implement a written preliminary proceeding. Thus, there may be an exchange of written pleadings before the oral proceedings. Furthermore, § 278(2) ZPO includes an obligation to try to settle the dispute amicably. If this fails, the oral proceedings commence. The court will order the taking of evi-

[136] The jurisdiction of these courts is regulated in detail by law, see §§ 45 et seqq Code of Administrative Court Procedure (*Verwaltungsgerichtsordnung, VwGO*).

dence only for relevant facts and facts at issue. After closing the oral proceedings and the taking of evidence the court pronounces its judgment. § 313 ZPO regulates form and content of a judgment. The German Code of Civil Procedure offers two appellate levels against judgments (*Berufung and Revision*). Once there are no more remedies against the judgment it becomes non-appealable. The ZPO distinguishes between the formal and the substantial *res judicata*. Once the judgment has become *res judicata* it may be enforced. However, under the circumstances mentioned in § 704 ZPO enforcing the judgment is also possible before it becomes *res judicata*.[137]

The duration of civil proceedings in Germany depends, amongst others, on the complexity of the case. In the years 2018–2020, the estimated time needed to resolve litigious civil and commercial cases at first instance was slightly more than 200 days. This places Germany in the middle of the EU member states.[138] Older data suggests that in first instance civil proceedings last usually between 4,8 months at the Local Courts and 8,7 months at the Regional Courts. But there are noticeable differences between the different federal states.[139]

There is no obligation to try mandatory preliminary proceedings outside the court before initiating court proceedings. Nevertheless, § 278(2) ZPO sets out the obligation of trying to settle the dispute amicably before starting with the oral hearings. Besides that, according to § 278(5) ZPO "the court may refer the parties for the conciliation hearing, as well as for further attempts at resolving the dispute, to a judge delegated for this purpose, who is not authorised to take a decision (conciliation judge, *Güterrichter*). The conciliation judge may avail themself of all methods of conflict resolution, including mediation." Since 2012 the court is able to suggest that the parties pursue mediation or other alternative dispute resolution procedures (§ 278a ZPO).

Limitation Periods

Which limitation periods apply for a claim depends on its subject matter. The different limitation periods are mainly governed in the German Civil Code (*Bürgerliches Gesetzbuch – BGB*). Special limitation periods are found in a variety of statutes, for example in the German Commercial Code (*Handelsgesetzbuch – HGB*) or the German Stock Corporation Act (*Aktiengesetz*), which govern some particular claims.

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137 See *Adolphsen*, para. 3; *Jacoby*, mn. 60 et seqq.
138 EU Justice Scoreboard 2022, p. 11.
139 Statistics from the year 2013, available on the website of the Federal Ministry of Justice https://www.bmj.de/DE/Themen/GerichtsverfahrenUndStreitschlichtung/SchutzUeberlangeVerfahren/SchutzUeberlangeVerfahren_node.html (17/04/2023).

Because of the huge number of different limitation periods which are established in the BGB and other statutes, it is only possible to give a short overview and to mention some important limitation periods. The standard limitation period – which is regulated in § 195 BGB – is three years. It applies if no special limitation period is applicable. According to § 196 BGB, the limitation period for claims regarding rights to a plot of land is ten years. Further, the German Civil Code provides a 30-year limitation period e.g. for claims for damages based on an intentionally caused fatal injury, personal injury, or injury to someone's health, violation of liberty, or violation of sexual self-determination and claims for surrender of possession arising from ownership rights and other rights *in rem*.[140]

Special limitation periods apply to purchased goods that are defective (§ 438 BGB). For these claims the basic rule is two years.[141] Further, there are special limitation periods for defective works produced under a works contract (§ 634a BGB).

Provisional Remedies

In Germany, there are two sorts of provisional remedies available: the attachment (*Arrest*) and the preliminary injunction (*einstweilige Verfügung*). They are designed to secure a potential future judgment or to temporarily regulate a legal relationship by not leading to a resolution of a dispute. The main intention is to secure a future enforcement.[142]

The attachment serves to secure enforcement on account of a monetary claim or of a claim which may become a monetary claim, whereas a preliminary injunction is the proper remedy to secure all other claims.[143] They are governed in §§ 916 ff. ZPO. In brief, to achieve an attachment order (*Arrestbeschluss*) or judgment (*Arresturteil*) an application must be filed which fulfils the requirements that also apply to a statement of claim.[144] Further the existence of an attachment claim (*Arrestanspruch*) and an attachment reason (*Arrestgrund*) must be conclusively presented and made credible.[145] An attachment order is subject to a protest by the defendant, either by filing an appeal or an objection.[146] To obtain preliminary injunction, the respondent needs to show to the satisfaction of the court an injunction claim (*Verfügungsanspruch*) and a ground for injunction (*Ver-*

140 See § 197 BGB.
141 In this context, special provisions may have to be observed, such as § 475e BGB, which was newly introduced with the reform of the sales law in 2022 and deals with goods with digital elements.
142 *Adolphsen*, para. 38, mn. 2.
143 *Adolphsen*, para. 38, mn. 4 and 5; *Jacoby*, mn. 7.
144 *Oberheim*, mn. 796.
145 *Oberheim*, mn. 798; *Adolphsen*, para. 38, mn. 19.
146 *Adolphsen*, para. 38, mn. 21.

fügungsgrund). That means that the claimant must show prima facie evidence of the claim to be secured by the injunction, or of the legal relationship they request the court to regulate by injunction. The claimant must also state the grounds why an injunction is necessary to safeguard their rights or to avoid potential injury or disadvantage in case a legal relationship is not regulated by injunction.[147]

Statement of Claim

The main elements of a statement of claim are listed in § 253(2) and (3) ZPO. According to § 253(2) ZPO, a statement of claim must include:

- the designation of the parties and of the court;
- and the exact information on the subject matter and the grounds for filing the claim, as well as a precisely specified petition. This motion for relief is, together with the underlining facts, essential for defining the subject matter of the claim (*Streitgegenstand*).

Furthermore, it shall include:

- the information as to whether, prior to the complaint being brought, attempts were made at mediation or any other proceedings serving an alternative resolution of the conflict were pursued, and shall also state whether any reasons exist preventing such proceedings from being pursued;
- wherever the subject matter of the litigation does not consist of a specific amount of money, information on the value of the subject matter of the litigation insofar as this is relevant for determining whether or not the court has jurisdiction;
- and it shall state whether any reasons would prevent the matter from being ruled on by a judge sitting alone.

The statement of claim must be in German. It may be submitted either by letter or by facsimile.[148]

In general, withdrawing a statement of claim is possible at any time. But without the consent of the defendant it is only possible until the time at which the defendant is to be first heard on the merits of the case (§ 269(1) ZPO). Later, the defendant's consent is necessary. According to

147 See *Oberheim*, mn. 832 et seqq.
148 See in detail *Oberheim*, mn. 140 et seqq.

§ 269(3)(2) ZPO the claimant is under an obligation to bear the costs of the dispute if they withdraw the claim.

The Defendant

The German civil procedure offers different opportunities to react once the defendant received the statement of claim. Which reaction they should show depends on how promising the defence against the action appears. If the defendant does not defend the claim, they risk a default judgment (*Versäumnisurteil*), which is regulated in § 331 ZPO. In this case, the court decides in accordance with the demand for relief insofar as the demand for relief is justified by the facts as submitted to the court by the complainant. In addition, the defendant can acknowledge the claim in the written preliminary proceedings or in the oral hearing. Then a judgment based on the defendant's acknowledgement (*Anerkenntnisurteil*) is rendered.[149]

Furthermore, it is possible to dispute the court's jurisdiction. This may lead to the dismissal of the action in form of a procedural judgment (*Prozessurteil*).

If they decide to defend the claim, the defendant should notify the court of this fact within a statutory period of two weeks after the statement of claim has been served on them. Concurrently, the court sets a deadline for the defendant within which they have to submit the written statement of defence. This period shall be at least another two weeks (§ 276(1) ZPO). The statement of defence must name the court where the action is pending, and the parties involved. Further, it must contain a specific motion, usually to dismiss the action in full or in part. The defence may be based on a (partial) denial of facts, or submitting additional facts which show that the claim is not founded. It can also be based on legal arguments disputing that there is a legal basis for the claim or for the relief sought by the claimant.

Counterclaims are allowed in civil proceedings. The defendant may defend against the claim on the merits and may at the same time file a counteraction (*Widerklage*). According to § 33 ZPO the court where the original action is pending also has jurisdiction for the counteraction if the subject matter of it is connected with the subject matter of the original action.

Third-Party Intervention

[149] See § 307 ZPO.

Third-party intervention is possible in two ways. First, there is the main third-party intervention (*Hauptintervention*) which is regulated in § 64 ZPO. It requires the complaint to be pending and covers the situation when the parties to the original dispute are in a dispute about who is the owner of a right or an object, and the third party asserts their own ownership against the parties. This form of third-party intervention is relatively rare. Second, there is the auxiliary third-party intervention (*Nebenintervention*) which is a quite common form of intervention. It is regulated in § 66 ZPO. It is applicable if a person who is not a party to a proceeding wishes to support the position of one of the parties whose success or defeat legally affect his interests. The intervener assists one of the parties to the original action and does not assert claims of their own. Moreover, they do not become a formal party to the proceedings. But they are allowed to act in the interest of the party whom they assist, including e.g. nominating witnesses, making assertions of fact and law, and participating in the oral hearings. This form of intervention is made by submitting a written pleading in the proceeding which sets out the legal interest of the intervener in supporting one of the disputing parties.

Consolidation

Consolidation of proceedings is allowed in the civil justice system of Germany. According to § 147 ZPO it is possible where claims forming the subject matter of several proceedings pending with a court have legal ties amongst each other.

Discontinuance/Suspension

Civil courts in Germany have limited powers to discontinue or stay the proceedings. The competent court will discontinue the proceedings primarily if the complainant withdraws the statement of claim (§ 269 ZPO). Moreover, they will discontinue the proceedings if the disputing parties declare the matter terminated.

A suspension of proceedings is possible if the decision on a legal dispute depends either wholly or in part on the question of whether a legal relationship does or does not exist, and this relationship forms the subject matter of another legal dispute that is pending or that is to be determined by an administrative agency (§ 148 ZPO). Besides, according to § 149 ZPO it is also possible in the event a criminal offence is suspected. In this case the court may direct the hearing to be suspended until the criminal proceedings have been terminated. Further, a suspension of proceed-

ings may be ordered on application if a party was represented by an attorney and one of the circumstances mentioned in § 246 ZPO eventuates.

Rules of Evidence

Regarding the rules of evidence it needs to be mentioned that in general only disputed facts which are relevant for deciding the case need to be proven. The court will determine whether the taking of evidence regarding disputed facts is necessary. It is not necessary if e.g. the fact is publicly known (§ 291 ZPO). If facts need to be proven, the court will render an order to take evidence (*Beweisbeschluss*). The taking of evidence usually takes place in front of the court as a part of the oral hearing.

In German civil proceedings, there are five forms of evidence available:

- Proof by inspection by the court (*Augenscheinsbeweis*) §§ 371 ff. ZPO,
- Proof by third-party witness testimony (*Zeugenbeweis*) §§ 373 ff. ZPO,
- Proof by expert testimony (*Sachverständigenbeweis*) §§ 402 ff. ZPO,
- Proof by documentary evidence (*Urkundsbeweis*) §§ 415 ff. ZPO,
- Proof by party testimony (*Parteivernehmung*) §§ 445 ff. ZPO.

Actions

German law distinguishes between three different types of actions.

- First, the action for performance (*Leistungsklage*), which is an action for judgment or order requiring the defendant to refrain from doing something.
- Second, the action for a declaratory judgment (*Feststellungsklage*), which seeks a declaration of the existence or non-existence of a legal relationship or legal obligation.
- Third, the action requesting a change of a legal right or status (*Gestaltungsklage*).[150]

Corresponding to these three different categories of relief, there are three different categories of judgments civil courts are empowered to render. The judgment which obliges a party to perform or refrain from a certain act (*Leistungsurteil*), the declaratory judgment (*Feststellungsurteil*), and the judgment modifying a legal right or status (*Gestaltungsurteil*).

Moreover, German law distinguishes between final judgments (*Endurteile*) and interlocutory judgments (*Zwischenurteile*). Interlocutory judgments are rendered on certain issues relevant to the

[150] *Jacoby*, mn. 277 et seqq.

subject matter of the case (§ 303 ZPO). Final judgments are the normal form of judgments. They conclude the instance.

The main elements of any judgment are listed in § 313 ZPO. It starts with the head (Rubrum) which sets out the court, the judges, the date of the last oral hearing, the parties, and their attorneys. Then follows the operative provisions of the judgment (*Tenor*), which includes the decision on the allocation of costs. After that the uncontested and the contested facts are restated briefly, followed by the court's opinion. At the end the signature(s) of the judge(s) are inserted.

Costs

The costs of civil court proceedings are divided into court fees and lawyer's fees. Generally, the costs of a civil court proceeding depend on the value of the matter in dispute. The fees and expenses charged by a German court are governed in the Court Fees Act (*Gerichtskostengesetz – GKG*). The statutory attorney fees are regulated in the Federal Attorney Remuneration Act (*Rechtsanwaltsvergütungsgesetz – RVG*).[151] In addition, §§ 91 ff. ZPO contain some rules regarding the costs of the proceedings, especially regarding the liability to pay the costs. In simple words, the party who caused the dispute must bear the costs. Normally, this is the unsuccessful party. According to § 91(1)(1) ZPO, "the party that has not prevailed in the dispute is to bear the costs of the legal dispute, in particular any costs incurred by the opponent, to the extent these costs were required in order to bring an appropriate action or to appropriately defend against an action brought by others." This provision only applies if one party entirely loses the process. If a party prevails in part, § 92 ZPO provides three possibilities to distribute the costs. Normally, the costs are shared proportionately.

Judges

In general, jurists in Germany must pass two state examinations. The first examination concludes academic law studies, and the second examination concludes practical legal training.[152] This also applies to judges. They must pass these two state examinations to get qualified to hold judicial

[151] *Jacoby*, mn. 816 et seqq.
[152] See e.g. § 1 Lawyers' Education Act of the Saarland.

office.[153] After working for at least three years on probation, judges are usually appointed for life.[154]

The education of jurists in Germany follows certain basic principles. One of them is that the legal education up to the second state examination is essentially uniform for all students. Passing the examination entitles the candidate to enter all legal professions. Hence, those who pass the second state law examination can become judges as well as lawyers or civil servants.[155] In addition, many other professions are open to them. However, the judiciary is not open to all graduates. In particular, the so-called "merit principle" and the principle of "selection of the best" apply to the appointment to a civil servant position. This follows from Article 33(2) GG.[156] In addition, a judge must be German in the sense of Art. 116 of the Basic Law, be loyal to the constitution, be qualified to hold judicial office and have the necessary social competence. These are essential minimum requirements. In addition, the personal and professional suitability of the applicant must be given.

With regard to the appointment of judges, a distinction must be made between federal judges of the highest federal courts[157] and the Federal Constitutional Court, on the one hand, and judges at the other courts, such as district courts and regional courts, on the other. In principle, the *Bundesländer* are responsible for the selection and appointment of judges. They determine the procedure themselves. Therefore, different rules apply to the selection and appointment of judges in each *Bundesland*. Often, however, a so-called judges' election committee is involved.[158] In Rhineland-Palatinate, for example, this election committee is composed of eight members of the *Landtag* (politicians), two judges as permanent members, two judges of the branch of the court for which the election is held as non-permanent members and one lawyer.[159] The chairperson of the committee is the Minister of Justice who has no voting rights. In some other federal states, however, there is no such judges' election committee.[160]

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153 See § 5(1) DRiG.
154 See § 10(1) DRiG.
155 *Lönisch*, 7 Ritsumeikan law review (1992), p. 71 (72), available via „Sonderdrucke aus der Albert-Ludwigs-Universität Freiburg".
156 *Badura*, in: Düring/Herzog/Scholz (eds.), Art. 33 GG, mn. 26; *Jarass*, in: Jarass/Pieroth (eds.), Art. 33 GG, mn. 9.
157 The highest federal courts are the Federal Supreme Court, the Federal Administrative Court, the Federal Fiscal Court, the Federal Labour Court and the Federal Social Court.
158 The Basic Law (*GG)* explicitly allows this, see Art. 98(4) GG.
159 § 15 Landesrichtergesetz Rheinland-Pfalz. Such rules can also be found in *Baden-Württemberg,*
Berlin, Brandenburg, Bremen, Hamburg, Hessen, Schleswig-Holstein and Thüringen.
160 There is no selection committee in *Bayern,*
Niedersachsen, Nordrhein-Westfalen, Mecklenburg-Vorpommern, Saarland, Sachsen and Sachsen-Anhalt.

The judges of the Federal Constitutional Court are elected half by the *Bundesrat* (representation of the *Bundesländer*) and half by the *Bundestag* (parliament), Art. 94(1) GG. The appointment of the federal judges of the highest federal courts is decided by the federal minister responsible for the particular subject area together with a judges' selection committee, Art. 95(2) GG. This selection committee consists of 32 members. 16 members are the corresponding ministers of the 16 *Bundesländer* and 16 are elected by the *Bundestag*.

As a key principle of the German constitution, the separation of executive, legislative and judicial powers contribute to the protection of the judge's impartiality. The Basic Law for the Federal Republic of Germany (*Grundgesetz – GG*) also guarantees the judge's impartiality. According to Art. 97 GG, "judges shall be independent and subject only to the law." Thus, judges are only bound by law, and not by any instructions (*sachliche Unabhängigkeit*). Further, § 30 of the German Judiciary Act (*Deutsches Richtergesetz – DRiG*) determines that a judge for life or for a specified term can only be transferred to another office under the circumstances mentioned there (*persönliche Unabhängigkeit*). To avoid conflicts of interest the German Code of Civil Procedure offers the possibility to challenge a judge on grounds of bias (§ 42 ZPO). They will be recused for fear of bias if sound reasons justify a lack of confidence in their impartiality. But it is not necessary that they were actually biased. From a partisan point of view, "there must be sufficient objective reasons which, when all the circumstances are reasonably assessed, give reason to doubt their impartiality".[161] Moreover, judges are restricted in practicing a secondary employment in that it must be authorized. In particular, they may not engage in any secondary activities that would make them biased.[162] Further, their independence does not release them from the obligation to contribute to an effective system of legal protection by avoiding overlong proceedings. Nevertheless, an unreasonable length of proceedings only exists if it can no longer be objectively justified, even when taking into account the judge's discretion.[163]

Judges can be removed from office, but only under certain restricted circumstances e.g., in judicial impeachment proceedings (Art. 98(2)(5) GG) or in formal disciplinary proceedings.[164]

Enforcement

[161] BVerwG 10/10/2017 – 9 A 16/16, NVwZ 2018, p. 181.
[162] *Säcker*, NJW (2018), p. 2375 (2379).
[163] BGH 05/12/2013 – III ZR 73/13, NJW 2014, p. 789 (792) with further evidences; *Säcker*, NJW (2018), p. 2375 (2378).
[164] See § 30 DRiG.

The recognition and enforcement of domestic and foreign judgments are mainly governed by the eighth book of the German Code of Civil Procedure, comprising Sections 704 – 945. These rules are complemented by various European regulations.

Enforcement within the European Union is primarily governed in the Brussels Regulation 2012.[165] Under this Regulation, judgments which are enforceable in the Member State where they were rendered are enforceable in all other Member States. Other European regulations containing provisions for the recognition and enforcement are Regulation (EC) No. 805/2004 of the European Parliament and the Council of 21 April 2004; Regulation (EC) No. 1896/2006 of the European Parliament and of the Council of 12 December 2006; and Regulation (EC) No. 861/2007 of the European Parliament and of the Council of 11 July 2007.

Further, the Lugano Convention 2007[166] regulates the recognition and enforcement of judgments within the contracting states. The Hague Convention on Choice of Court Agreements can also be mentioned, but at this time, only the Member States of the European Union (except Denmark) and Mexico are bound by the Convention, with Singapore soon to follow.

In addition, several bilateral treaties govern the recognition and enforcement of judgments, e.g. the treaties for the mutual recognition and enforcement of judgments in civil and commercial matters with Israel and Tunisia.

2. Commercial Arbitration

Arbitration has a long tradition in Germany, particularly in commercial matters.[167] The German Arbitration Law is governed by the tenth book of the German Code of Civil Procedure (*Zivilprozessordnung* – ZPO), comprising Sections 1025–1066. As part of the Imperial Acts on the Judiciary and Judicial Procedure (*Reichsjustizgesetze*) the ZPO first came into force in 1879. This original version already contained an arbitration law[168] and adopted a very favourable approach to arbitration.[169] Besides some minor amendments it remained unchanged for nearly 120 years until 1 January 1998, when the current German Arbitration Law came into force. It is based on the UNCITRAL Model Law from 1985.[170] The adoption of the Model Law aligned the German Ar-

165 Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.
166 Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.
167 *Böckstiegel/Kröll/Nacimiento*, in: Böckstiegel/Kröll/Nacimiento (eds.), General Overview, mn. 1.
168 *Prütting*, in: Gehrlein/Prütting (eds.), § 1025 ZPO, mn. 4; *Wegen/Barth/Wexler-Uhlich*, Chapter 2 mn. 4.
169 *Böckstiegel/Kröll/Nacimiento*, in: Böckstiegel/Kröll/Nacimiento (eds.), General Overview, mn. 2.
170 Wegen/Barth/Wexler-Uhlich, Chapter 2 mn. 9.

bitration Law with international standards and contemporary views on the regulation of international arbitration. This completely new version of the tenth book is to a large extent a literal adoption of the UNCITRAL Model Law.[171] Nevertheless there are some deviations. Most important is the wider scope of application of the ZPO's tenth book. It applies indiscriminately to domestic and international as well as commercial and non-commercial arbitrations, as long as the seat of arbitration is in Germany (§§ 1025, 1030(1) ZPO). The German legislature held the view that a single regime for all arbitrations was justified to avoid the sometimes difficult distinctions between national and international cases. Also, the restriction to "commercial" arbitration included in the Model Law was eliminated.[172] Hence any past or future dispute concerning a specific legal relationship is arbitrable (§ 1029(1) ZPO). Nevertheless, there are types of disputes that are non-arbitrable in Germany, e.g. disputes regarding tenancy relationships for residential accommodation (§ 1030(2) ZPO). As a result, the German Arbitration Law provides for a uniform regime and not two separate laws concerning domestic and international arbitration. Other deviations from the Model Law are less significant, like § 1032(1) – dismissal instead of referral[173] – or § 1032(2) 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.

There have been no significant amendments to the German Arbitration Law since 1998. Also, the 2006 revision of the UNICTRAL Model Law is not yet adopted by German law.[174] In 2015 the German Bar Association published a "statement… on necessary amendments to §§ 1025 ZPO" with the aim to strengthen the international acceptance of the German Arbitration Law.[175] The Federal Government has established a working group considering a revision of the German Arbitration Law, which convened for the first time in 2016. There have been no results in this respect so far.[176] Currently, however, the matter is on the move again. On the one hand, the Federal Ministry of Justice is striving for a reform of §§ 1025 ff. ZPO. On the other hand, it plans to make state courts more attractive for the settlement of international trade disputes. For this purpose, it presented key point papers at the beginning of 2023.

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171 *Kröll*, in: Bosman (ed.), p. 1 (1); *Böckstiegel/Kröll/Nacimiento*, in: Böckstiegel/Kröll/Nacimiento (eds.), General Overview, mn. 4.
172 *Kröll*, in: Bosman (ed.), p. 1 (1).
173 Wegen/Barth/Wexler-Uhlich, Chapter 2 mn. 9.
174 See further *Wegen/Barth/Wexler-Uhlich*, Chapter 2 mn. 12.
175 Statement 10/15, https://anwaltverein.de/de/newsroom/sn-10-15?page_n27=132 (17/04/2023).
176 *Münch*, in: Krüger/Rauscher (eds.) MüKo ZPO, Vor § 1025 ZPO, mn. 267.

a) Arbitration Practice

There are many institutions offering arbitration services in Germany.

The leading arbitration institution in Germany is the DIS (*Deutsche Institution für Schiedsgerichtsbarkeit*).[177] It can look back to 100 years of experience, 25 years under the current name. The DIS is a registered private association which provides preparation, support and administration of arbitral proceedings and other alternative dispute resolution proceedings. Further it offers important materials on arbitration, like a case law database.[178] The DIS has created its own procedural rules (DIS Rules). The first set of DIS Rules was adopted by its predecessor in 1920. Those rules were revised in 1998 and more recently in 2018. In comparison to the previous versions, the 2018 Rules are characterised by increased codification and more detailed provisions. The most significant changes introduced into the Rules are provisions aimed at increased efficiency and a more active role of the DIS itself, taking over some of the duties that were previously imposed on the arbitrators.

The Court of Arbitration of the Hamburg Chamber of Commerce[179] is one of the oldest arbitral institutions in the world with a long tradition. It has also created its own procedural rules. They were amended in September 1958 and fully revised in 2000. The Court of Arbitration of the Hamburg Chamber of Commerce focuses on commercial disputes.

The German Maritime Arbitration Association (GMAA)[180] is a private association dedicated to the promotion of alternative dispute resolution in international maritime law. It offers a procedure for the worldwide maritime industry to settle shipping disputes. The GMAA does not administrate arbitration proceedings itself but provides arbitration rules and relevant information.

Especially in Hamburg there are many more arbitral institutions, most of them specialised in a specific field (for example the Court of Arbitration of the German Coffee Association – *Schiedsgericht des Deutschen Kaffeeverbandes*).[181]

Equally worth mentioning are commodity exchanges as institutions for international arbitration in Germany. They operate under special arbitration rules and maintain their own arbitral tribunals.[182]

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177 For further information see https://www.disarb.org/en/ (17/04/2023).
178 https://www.disarb.org/en/resources/case-law-database (17/04/2023).
179 See https://www.ihk.de/hamburg/en/fairplay/arbitration-mediation-conciliation/arbitration/court-arbitration 1168698 (17/04/2023).
180 Information in English available at: https://gmaa.de/files/media/pdf/Multilingual_information/GMAA_%C3%9Cberblick_ENG.pdf (17/04/2023).
181 See the enumeration: https://www.ihk.de/hamburg/en/fairplay/arbitration-mediation-conciliation/arbitration/arbitration-in-hamburg-5473976 (17/04/2023).

The exact number of all commercial arbitration cases annually is unknown. There is only limited empirical data because most arbitrations are conducted on an *ad hoc* basis and the awards are rarely published.[183] However, some data is available for the DIS. Every year, the DIS publishes the number of proceedings initiated and the values in dispute. In 2019, 151 DIS proceedings were initiated, of which 110 were conducted pursuant to the DIS Rules. In 2020, the number of DIS proceedings increased to 165, of which 132 were conducted pursuant to the DIS Rules. In 2021, the number of proceedings dropped to 133.[184] 65 % of them were purely domestic and 35 % of them included at least one foreign party. The number of proceedings fluctuates from year to year. For the period 2012 –2021, the number of proceedings ranged between 125 (in 2012) and 172 (in 2016).

In terms of absolute numbers, arbitration proceedings play only a minor role compared to state court proceedings. The situation is a bit different if one takes the values in dispute as a basis, which are considerably higher.[185]

The German judicial system has specialised commercial chambers and is able to provide expeditious and competent dispute resolution for domestic disputes in most areas.[186]

The judges and state courts dealing with arbitration-related matters in Germany generally have very sound knowledge of the Arbitration Law. They act in a discretionary way in line with the law's spirit. Even though there is no central federal authority on arbitration-related issues, the highest court at the state level has a high degree of experience and concentration.

Generally, German courts and the law take a supportive stance on arbitration. Their relationship can be characterised by the terms of "fair competition" and "sound cooperation". Once it has been determined that there is an arbitration agreement between the parties, German courts adopt a very arbitration-friendly approach, especially in relation to questions of the validity of the arbitration agreement. Particularly the case law shows the clear tendency of the German state courts to respect and enforce the parties' decision to arbitrate.[187]

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182 Wegen/Barth/Wexler-Uhlich, Chapter 1 mn. 88.
183 *Kröll*, in: Bosman (ed.), p. 1 (5 et seq.).
184 See DIS-Statistics, available at: https://www.disarb.org/en/about-us/our-work-in-numbers and https://www.disarb.org/en/about-us/our-work-in-numbers/archive (17/04/2023).
185 *Münch*, in: Krüger/Rauscher (eds.) MüKo ZPO, Vor § 1025 ZPO, mn. 37.
186 *Kröll*, in: Bosman (ed.), p. 1 (6).
187 See *Böckstiegel/Kröll/Nacimiento*, in: Böckstiegel/Kröll/Nacimiento (eds.), General Overview, mn. 7.

b) Arbitration Agreement

§ 1029(1) ZPO defines the arbitration agreement as "an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in future in respect of a defined legal relationship". German Arbitration Law sets out few substantive and formal requirements regarding the minimum content of an arbitration agreement. Arbitration agreements can be either concluded as a separate agreement or be included as a clause in the main contract. Generally, the validity of an arbitration agreement will depend on the capacity of the parties, the arbitrability of the dispute, and the special form requirements.

First, the agreement must reflect the parties' intent to arbitrate disputes arising from a defined legal relationship (§ 1029(1) ZPO). According to § 1029(1) ZPO an arbitration agreement can cover past as well as future disputes.

Second, § 1031 ZPO sets out formal requirements. The agreement must be contained in a document signed by the parties (or in an exchange of letters, faxes, telegrams, or other means of telecommunication providing a record of the agreement). But it is also sufficient if a commercial confirmation letter (*Kaufmännisches Bestätigungsschreiben*) by one of the parties contains an arbitration clause and the other party does not object to this letter.[188] Arbitration agreements involving a consumer must be personally signed by both parties, and the arbitration agreement must be contained in a separate document that does not include any additional agreements (§ 1031(5) ZPO). But the electronic form – stipulated in § 126a BGB – is also permissible. If the agreement does not comply with the formal requirements, this generally leads to its invalidity. Nevertheless, it is important to consider § 1031(6) ZPO, which bars parties from invoking the formal invalidity of an agreement once they have started to argue their case on the substance of the dispute. This cures the defect of title.

Basically, any past or future dispute concerning a specific legal relationship is arbitrable (§ 1029(1) ZPO). Specifically disputes involving an economic interest are arbitrable under § 1030(1) ZPO. § 1030(2) ZPO excludes the arbitrability of disputes regarding tenancy relationships for residential accommodation in Germany. Furthermore, some more disputes governed outside the German Code of Civil Procedure are non-arbitrable. For example, patent validity disputes are not arbitrable.[189] Further, there are limitations for individual employment disputes.[190] Disputes under corporate law are arbitrable. Nevertheless, there is a special situation to be considered here. If

188 *Wegen/Barth/Wexler-Uhlich*, Chapter 4 mn. 90 et seq.
189 *Kröll*, in: Bosman (ed.), p. 1 (17).
190 §§ 101 et seq. Labour Court Act (Arbeitsgerichtsgesetz).

intra-corporate disputes have effect against all shareholders, the arbitration agreement must be drafted in such a way as to ensure the participation of all shareholders who may be affected by the legal effect of an arbitral award.[191]

Since German Arbitration Law does not impose any restrictions on the parties participating in arbitration proceedings, both natural and legal persons, consumers and the state or state agencies can participate in arbitral proceedings.[192]

How the law applicable to the arbitration agreement is determined depends on the specific issue in question. The law applicable to the substantive validity and interpretation of an arbitration agreement is determined by the contract law governing the arbitration agreement. § 1059(2)(1)(a) ZPO allows the parties to choose the law applicable to their arbitration agreement. The law at the seat of the arbitration only applies if there is no choice of the parties about it. Regarding the formation of an arbitration agreement, the personal capacity to conclude such an agreement is governed by the domestic laws of the parties. That means that the law applicable to the formation is determined by the law of their domicile or habitual residence (*lex domicilii*). Form requirements are governed by German law if the arbitration is seated in Germany, because the law applicable to the form of the agreement depends on the seat of the arbitration.[193]

§ 1040(1) ZPO adopts the doctrine of separability in German Arbitration Law. Arbitration agreements can be included as a clause in the main contract or be concluded as a separate agreement, but in any event the arbitration agreement constitutes a separate agreement independent of the main contract. Thus, the arbitration agreement and the main contract are two separate agreements. For that reason, the arbitration clause does not necessarily share the fate of the main contract and by way of derogation from § 139 of the German Civil Code there is no presumption of invalidity of the whole contract.[194] In other words, the invalidity of the main contract does not imply the invalidity of the arbitration clause. Nonetheless, it is possible that both are affected by the same defect. Particularly the lack of consent to the main contract will in general also affect the arbitration agreement included in it.

The arbitration agreement confers jurisdiction on the arbitral tribunal. In addition, it excludes the jurisdiction of state courts for the decision on the substance of the case. In German Arbitration Law the arbitral tribunal can rule on its own jurisdiction (§ 1040(1) ZPO). So, the principle

191 BGH 06/04/2009 – II ZR 255/08, NJW 2009, p. 1962; BGH 06/04/2017 – I ZB 23/16, NJW-RR 2017, p. 876.
192 *Kröll*, in: Bosman (ed.), p. 1 (15).
193 See *Balthasar*, in: Balthasar (ed.), Chapter J, mn. 14 et seqq.
194 See § 139 of the German Civil Code which normally presumes the invalidity of the whole contract.

"competence-competence" is generally recognised in Germany. Nevertheless, the parties are allowed to seek a state court review of the arbitral tribunal's decision on jurisdiction within a month (§ 1040(3)(2) ZPO). Hence, the arbitral tribunal's decision on its own jurisdiction is only preliminary and not binding on the state courts.[195]

Generally, an arbitration agreement is only binding for the parties to the agreement. German Arbitration Law does not provide the "group of companies" doctrine.

In addition, there are no express provisions on "joinder of parties" in the German Arbitration Law and the elaborate provisions of the German Code on Civil Procedure on third-party intervention for court proceedings are not directly applicable to arbitral proceedings. But parties are free to agree on a third-party intervention in their arbitration agreement or even during the proceedings. Hence, joining a third party which is not itself party to the arbitration agreement is possible under certain circumstances. First, all parties, including the additional party, and the arbitral tribunal must agree to the joinder. Second, the additional party must agree to the extant composition of the arbitral tribunal. The DIS Rules provide additional guidance on this practice (Art. 17 ff. DIS Rules).

c) Conduct of the Arbitration

The place of arbitration can be agreed by the parties. If there is no agreement on the place of arbitration it will be determined by the arbitral tribunal (§ 1043 ZPO).

Party autonomy is one of the guiding principles of the German Arbitration Law. It is closely intertwined with the freedom of citizens to regulate their legal relationships at their own will and responsibility (*Privatautonomie*).[196] In an arbitral context this means on the one hand the freedom to choose the applicable law or rules for the parties' legal relationship (§ 1051 ZPO).[197] On the other hand the parties have the freedom to shape the process themselves, limited only by a few binding rules and those that secure a minimum procedural standard. However, substantive choice of law and procedural agreement must be distinguished from each other.[198]

The central provision in this context is § 1042 ZPO, which sets out the fundamental principles for the conduct of arbitral proceedings. § 1042(3) ZPO provides that "… subject to the manda-

195 *Huber/Bach*, in: Böckstiegel/Kröll/Nacimiento (eds.), § 1040, mn. 1.
196 *Hoffmann/Stegemann*, JuS (2013), p. 207 (207).
197 *Hoffmann/Stegemann*, JuS (2013), p. 207 (207).
198 *Münch*, in: Krüger/Rauscher (eds.) MüKo ZPO, § 1042 ZPO, mn. 91.

tory provisions of this book, the parties are free to determine the procedure themselves or by reference to a set of arbitration rules." One of these mandatory provisions is e.g. § 1048(4) ZPO, stipulating the right to excuse.[199] Another fundamental rule of arbitral proceedings is stipulated in § 1042(1) ZPO, according to which the parties are to be accorded equal treatment and each of the parties is to be given an effective and fair hearing. Both rights are indispensable principles guaranteed by the German Constitution.[200] It is not possible to waive this requirement in advance, and a violation of equality and fair trial principles will justify a request to have the award set aside and create a defence to enforcement.[201] In order to preserve the right to be heard, the parties must be informed in time of the factual elements on which the decision is based. They must be given the opportunity to comment on the factual and legal aspects of the case.[202] The possibility of legal representation as a basic principle of a fair trial is set out in § 1042(2) ZPO which provides that lawyers may not be excluded as authorised representatives.

Apart from these restrictions, the parties are free to shape all aspects of the proceedings as they wish. The German Law explicitly mentions that the parties are free to choose the language in which the arbitration is to be conducted, § 1045 ZPO. They can also agree on rules for the conduct of oral hearings and the taking of evidence (§ 1042(3), § 1046(1) and § 1047(1) ZPO). If the parties have not agreed on the conduct of the arbitral proceeding – neither expressly nor by reference to arbitration rules – §§ 1044 et seq. ZPO provide a basic structure.

If there is no agreement between the parties, arbitration proceedings commence on the date on which the defendant has received the application to bring the dispute before an arbitral tribunal (§ 1044 ZPO). The arbitral tribunal can set deadlines for filing a statement of claim and a statement of defence (§ 1046(1)(1) ZPO). It can also exclude arguments and evidence from the proceedings assuming that the deadlines are not observed, and the delay is not excused (§ 1046(2) ZPO). Parties must have access to any written pleadings, documents, and other communications (e.g. expert reports) submitted to the arbitral tribunal (§ 1047(3) ZPO). In case a party does not appear at the hearing or does not submit documentary evidence, the tribunal may render an award based on the evidence before it (§ 1048(3) ZPO). The award itself must be made in writing and signed by all arbitrators by indicating the date and the place where it is made (§ 1054(1)(1), (3) ZPO). The award must be reasoned, and the arbitral tribunal must transmit a signed original

199 *Münch*, in: Krüger/Rauscher (eds.) MüKo ZPO, § 1042 ZPO, mn. 8.
200 *Sachs/Lörcher*, in: Böckstiegel/Kröll/Nacimiento (eds.), § 1042, mn. 2.
201 See § 1059(2)(1)(b), (d), § 1060(2)(1) ZPO.
202 OLG München 09/11/2015 – 34 Sch 27/14, SchiedsVZ 2015, p. 303 (304).

of the award to each of the parties.[203] Further it is necessary that the arbitral tribunal makes an award on the costs of the arbitration (§ 1057(1) ZPO).

In the absence of an agreement of the parties and of any provision in the tenth book of the ZPO, the rules of procedure shall be determined by the arbitral tribunal in its discretion (§ 1042(4) ZPO).

In general, the taking of evidence is also largely submitted to party autonomy. The parties may agree whether there should be limitations on the admissible evidence, what standard the tribunal should apply in assessing the evidence and how it should weight them. Also, the parties are free to submit the whole process to a particular set of rules such as the IBA Rules on Taking Evidence in International Arbitration.

If there is neither an agreement nor specific legal provisions the arbitral tribunal has the right to determine the admissibility of taking evidence, to conduct the taking of evidence and to freely assess the result (§ 1042(4) ZPO). The arbitral tribunal is not bound by the same rules as state courts while taking evidence. But the parties' right to a fair hearing and to present their case must be observed in the taking of evidence, in particular the parties must have the right to comment on witness statements.[204]

Generally, there are no restrictions as to the admissibility of evidence. In arbitral proceedings, any person can be heard as witness, even parties and their legal representatives. In contrast, in state court proceedings they may not act as witnesses. Regarding the hearing of witnesses the arbitral tribunal determines how it is conducted if there is no agreement. In this case the tribunal has the authority to decide whether cross-examination will be allowed. Also, its procedural discretion covers the question whether written witness statements shall be provided before the hearing.[205]

The district courts (*Amtsgerichte*) are able to support the arbitral tribunal in the taking of evidence, in the case that the arbitral tribunal or, a party with the consent of the arbitral tribunal, files a corresponding petition (§ 1050 ZPO). On that basis, the court has several competences. It can examine witnesses and experts if they do not appear voluntarily before the arbitral tribunal, take oaths, order the production of documents, and it can issue requests to foreign courts to hear witnesses abroad.

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203 See § 1054(2), (4) ZPO.

204 OLG Hamburg 16/09/2004 – 6 Sch 1/04, Instanzgerichte ZivilR Sept. 2004 (Wolters Kluwer Online); confirmed by BGH 29/06/2005 – III ZB 65/04, SchiedsVZ 2005, p. 259.

205 *Kröll*, in: Bosman (ed.), p. 1 (32).

There is no general obligation to disclose documents in arbitral proceedings. German courts can order the production of a specific document, but the power to order the production of documents is limited to individual documents which must be specified in the order.

German Arbitration Law allows arbitral tribunals as well as state courts to grant interim measures of protection.[206] According to § 1041(1)(1) ZPO, the arbitral tribunal is permitted to make those interim orders that it deems necessary. § 1041 ZPO does not contain an enumeration of possible measures. Among others, the following measures are possible: pre-award attachment orders, orders to refrain from changing the status quo, orders to post or refrain from invoking security in the form of a bank guarantee, or orders not to dispose of the property in dispute.[207] The competent state court can declare an interim order of the arbitral tribunal enforceable if a party requests it. Conducting at least a summary review of the requirements for interim relief the state court will ensure that the interim orders do not pre-empt a decision on the merits. In general, interim relief before an arbitral tribunal has only limited scope in practice.

Regarding the representation in arbitral proceedings German Arbitration Law contains only a few provisions, e.g. § 1042 ZPO. It rules that a lawyer may not be excluded from acting as authorized representative, which does not mean that representation by a lawyer is mandatory in arbitration proceedings. Parties are free to represent themselves or can be represented by a non-lawyer. Further they must not be admitted to the local bar. So, also lawyers from other jurisdictions may act as legal counsels representing parties in arbitral proceedings sited in Germany.

Arbitral proceedings are not public. Lawyers involved must keep their professional duties of confidentiality and the arbitrators are not allowed to disclose the deliberations of the arbitral tribunal. Nevertheless, if parties wish proceedings to be confidential, it is recommendable that they conclude a separate confidentiality agreement, because an arbitration agreement as such does not imply the obligation to keep information confidential.[208] There are no provisions dealing with the confidentiality of documents. However, the procedural rules of some arbitral institutions in Germany (like the DIS Rules) protect the strict confidentiality of proceedings administered by themselves.[209]

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206 *Kröll*, in: Bosman (ed.), p. 1 (34).
207 *Schlosser*, in: Bork/Roth (eds.) Stein/Jonas ZPO, § 1041 ZPO, mn. 7 et seqq.
208 *Balthasar*, in: Balthasar (ed.), Chapter J, mn. 60.
209 See Artide 44 of the DIS Rules; https://www.disarb.org/en/tools-for-dis-proceedings/dis-rules.

d) Arbitrators

In Germany, the composition of the arbitral tribunal is to a large extend left to party autonomy. Only where it appears necessary to ensure a fair and equitable treatment of the parties, restrictions to the parties' autonomy exist. Parties are free to choose the number of arbitrators to decide the dispute and the procedure for their appointment (§ 1034(1), § 1035(1) ZPO). Also, they are free to agree on a procedure for challenging them (§ 1037(1) ZPO).

A court intervention in the appointment of arbitrators is possible under certain circumstances.

In the absence of an agreement regarding the appointment the default mechanism under § 1035(3) ZPO gets triggered. First, the parties shall try to agree on a sole arbitrator. In case the parties are unable to come to such an agreement any party can ask the competent state court to make an appointment. The same applies in the case of a three-member arbitral tribunal. If, either one party fails to appoint its co-arbitrator or a joint appointment between the parties regarding the third arbitrator is not possible, any party is allowed to ask the competent state court to make the appointment.

If there is an agreement but the parties' chosen procedure for selecting arbitrators fails, the mechanism under § 1035(4) ZPO gets triggered. In this case each party may request the court to take the necessary measures.[210]

According to § 1035(5) ZPO, the court is not entirely free in its decision. The court shall have due regard to any qualifications required of the arbitrator by the party's agreement and to such considerations as are likely to secure the appointment of an impartial and independent arbitrator. In appointing a sole or a third arbitrator, the court also has to consider the advisability of appointing an arbitrator of a nationality other than those of the parties.

Further a state court can intervene in the selection of arbitrators if the nomination procedures are unconscionable (§ 1034(2) ZPO). Modifying an unfair nomination procedure into a workable one represents a viable option for the state court in this case. Generally, an intervention is not possible without a party motion. According to § 1034(2) ZPO, a party must request the court within two weeks after becoming aware of the tribunal's formation.

The German Arbitration Law does not require any specific qualifications or characteristics for arbitrators. Also, there are no limitations regarding their nationality. Neither the German Arbitration Law nor the most important arbitration rules contain any limitations. So, non-nationals can

[210] See *Wegen/Barth/Wexler-Uhlich*, Chapter 5 mn. 55 et seq.

act as arbitrators when the seat of arbitration is in Germany. However, it is important that arbitrators guarantee their impartiality and independence (§ 1036(2) ZPO).

Judges may also be appointed as arbitrators. In this case parties should be aware of § 40(1) of the German Law on Judges (*Deutsches Richtergesetz*, DRiG). If the chosen arbitrator acts as an active judge, § 40(1) DRiG imposes some stricter requirements. It must be excluded that – according to the assignment schedule of the court – the judge would have to deal with the matter in their professional capacity and they must be nominated either by all parties jointly or by a neutral third party. This serves to ensure the independence and impartiality of judges outside their official capabilities.[211]

Arbitrators have various obligations. Although there is currently no "Best Practice Codex" that summarises them, there is a broad agreement on the existing obligations.[212] Some of them concern the conduct of proceedings, like the obligation to settle the dispute in accordance with the arbitration agreement and the rule of law.[213] Further, the arbitrator must attend all hearings and consultations and investigate the relevant facts and all legal aspects of the case.[214] He must conduct the proceedings without unnecessary delay and render a valid and final award.[215] Also, he must avoid any conflict of interest.[216] It is important that the arbitrator conducts the proceedings fairly and treats the parties equally.[217] With regard to confidentiality obligations, the same applies to the arbitrator as to a judge because § 43 DRiG is applied analogously to arbitrators.[218] The arbitrator has the obligation to keep the identity of the parties and any personal information. The facts of the dispute and the arbitral proceedings also must be kept confidential unless otherwise authorized by the parties.[219] Finally, the arbitrator is obliged to act in person and is not allowed to delegate their duties.[220]

The German Arbitration Law does not contain any explicit provision regarding the immunity of arbitrators. However, it should be noted that the relationship between the parties and the arbitrator is a contractual one. It follows from this that an arbitrator is in principle liable to the parties

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211 KG Berlin 06/05/2002 – 23 Sch 01/02, SchiedsVZ 2003, p. 185 (186).
212 *Voit*, in: Musielak/Voit (eds.), § 1035 ZPO, mn. 23.
213 BGH 05/05/1986 – III ZR 233/84, NJW 1986, p. 3077.
214 *Voit*, in: Musielak/Voit (eds.), § 1035 ZPO, mn. 24.
215 *Wegen/Barth/Wexler-Uhlich*, Chapter 5 mn. 73 et seq.
216 Wegen/Barth/Wexler-Uhlich, Chapter 5 mn. 75.
217 Wegen/Barth/Wexler-Uhlich, Chapter 5 mn. 78.
218 BGH 23/01/1957 – V ZR 132/55, NJW 1957, p. 592; § 43 DriG "Judges are to preserve secrecy regarding the course of deliberations and voting even after their service has ended."
219 *Prütting*, in: Gehrlein/Prütting (eds.), § 1035, mn. 9.
220 See *Münch*, in: Krüger/Rauscher (eds.) MüKo ZPO, Vor § 1034, mn. 21; *Prütting*, in: Gehrlein/Prütting (eds.), § 1035, mn. 9.

for any violation of their contractual duties regulated by the general rules of the law of obligations. In German Civil Law, liability is then determined pursuant to § 280 et seqq. of the German Civil Code (BGB). Further, liability may also be based on tort law. This is then determined according to § 823 et seqq. BGB.[221] Nevertheless, the arbitrator's liability is limited in the same way as the liability of judges. This is an implied term of the contractual relationship between the arbitrator and the parties unless there is an agreed term to the contrary. In fact, this means that arbitrators are liable to the parties in the same way and under the same circumstances as court judges.[222] Hence, arbitrators are liable for the erroneous application of the law which constitutes a deliberate criminal offence and for negligence under the general rules of the law of obligations (e.g. if the arbitrator fails to disclose circumstances giving rise to doubts as to their independence or impartiality and if this causes additional cost or delay). For institutional arbitrations a limitation of liability is often contained in the arbitration rules of the institution concerned.[223]

Challenging an arbitrator is possible based on only two grounds. According to § 1036(2) ZPO, a party may challenge an arbitrator if circumstances give rise to justified doubts as to their independence or impartiality. An arbitrator can also be challenged if they do not possess the qualifications agreed upon by the parties.

There is no clear definition of the circumstance that gives rise to justifiable doubts. To interpret the terms of independence or impartiality, German courts will apply the same standards as for state court judges (§§ 41 et seq. ZPO). But a less austere standard than for judges is to be applied.[224]

The procedure for challenging an arbitrator is governed in § 1037 ZPO. According to this, parties are free to agree on a procedure. In the event that there is no agreement between the parties, § 1037(2) ZPO prescribes what is to be done.[225] If a challenge under any procedure agreed upon by the parties or under the procedure of subsection 2 is not successful, the challenging party has the possibility to request the court to decide on the challenge (§ 1037(3) ZPO).

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221 *Münch*, in: Krüger/Rauscher (eds.) MüKo ZPO, Vor § 1034, mn. 32.

222 *Münch*, in: Krüger/Rauscher (eds.) MüKo ZPO, Vor § 1034, mn. 33; *Prütting*, in: Gehrlein/Prütting (eds.), § 1035, mn. 10; *Voit*, in: Musielak/Voit (eds.), § 1035 ZPO, mn. 25; see § 839(2) of the German Civil Code.

223 Like § 44 DIS Rules.

224 *Kröll*, in: Bosman (ed.), p. 1 (22).

225 "Absent such agreement, the party intending to challenge an arbitrator is to submit to the arbitral tribunal, within two weeks of having become aware of the composition of the arbitral tribunal or of any circumstance as referred to in section 1036 (2), a written statement of the reasons for challenging the arbitrator. If the challenged arbitrator does not withdraw from office or if the other party does not agree to the challenge, then the arbitral tribunal decides on the challenge."

e) Arbitral Award

There are three different types of awards. The arbitral tribunal may render final awards, partial awards or interim awards.

The final award must be made in writing and be signed by all arbitrators by indicating the date and the place where it is made (§ 1054(1)(1), (3) ZPO). The award must be reasoned, and the arbitral tribunal must transmit a signed original of the award to each of the parties (1054(2), (4) ZPO). The reasoning should not be contradictory and support the decision rendered. But the requirements for the reasoning are not the same as those for court decisions.[226] As partial awards contain a definite resolution of a part of the dispute, they must meet the same formal requirements as final awards.[227]

With regard to the law applicable to the substance of the dispute, § 1051 ZPO provides that the arbitral tribunal shall decide the dispute in accordance with such rules of law chosen by the parties. If the parties have not agreed on the applicable law, the arbitral tribunal shall apply the law of the state with which the subject-matter of the proceedings has the closest connection (§ 1051(2) ZPO).

According to § 1052(1) ZPO, in arbitral proceedings with more than one arbitrator, any decision of the arbitral tribunal shall be made by a majority of the votes of all its members, unless there is a different agreement of the parties.

§ 1059(2) ZPO lists some grounds for setting aside an award. It is possible to summarize them into the following four categories:

- The arbitral tribunal lacked jurisdiction, i.e. if the arbitration clause is invalid.
- The party making the application to set aside the award was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present their case, so if there was a breach of the right to be heard.
- The composition of the arbitral tribunal or the arbitral proceedings did not comply with the requirements under applicable arbitration law or the agreement between the parties, provided it can be assumed that this has influenced the arbitration award.
- The award conflicts with German public policy.

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226 OLG München 20/12/2006 – 34 Sch 16/06, BeckRS 2007, p. 913; *Voit*, in: Musielak/Voit (eds.), § 1054 ZPO, mn. 4.

227 *Kröll*, in: Bosman (ed.), p. 1 (38).

f) Enforcement

On application, the Higher Regional Courts can declare an arbitral award to be enforceable. Local jurisdiction has either the Higher Regional Court chosen by the parties or the one with jurisdiction for the place of arbitration.[228] Different rules apply to the recognition and enforcement of domestic and foreign arbitral awards.

Domestic arbitral awards are governed by § 1060 ZPO. Although a domestic award has the same effect between the parties as a final and binding court judgement,[229] it must be declared enforceable.

Foreign arbitral awards are governed by § 1061 ZPO, which provides that they are to be recognized and enforced according to the New York Convention. Generally, they are recognised and enforced unless a party establishes that one of the grounds for refusal listed in Article V of the New York Convention exists.

Regarding the grounds for refusal of recognition and enforcement of arbitral awards, the German Arbitration Law differentiates also between domestic and foreign arbitral awards. Nevertheless, the defences are essentially the same.[230]

A party's application for enforcement of a domestic arbitral award can be rejected if it is inadmissible, the defendant has successfully raised material defences against the application, or there are grounds for setting aside the award. § 1060(2) ZPO refers to the grounds for setting aside an award which are mentioned in § 1059(2) ZPO. Generally, the grounds for setting aside an arbitral award also constitute a defence to enforcement.[231]

Germany is a party to numerous multilateral international conventions in the field of arbitration. Moreover, there are quite a lot of bilateral treaties including provisions which might be relevant for the enforcement of foreign arbitral awards.

Germany has ratified the Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927. Germany is a party to the 1961 European Convention on International Commercial Arbitration.[232]

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228 § 1062(1) Nr. 4 ZPO.
229 § 1055 ZPO.
230 *Balthasar*, in: Balthasar (ed.), Chapter J, mn. 102.
231 Ibid.
232 See https://www.disarb.org/en/resources/legislation-treaties (17/04/2023).

g) Fees and Costs

German Arbitration Law contains a separate provision dealing with costs which only applies if there is no agreement between the parties on the procedure and the criteria for cost allocation.[233] According to § 1057(1) ZPO, the arbitral tribunal shall first allocate the costs of the arbitration and then render a decision on the amount of these costs (§ 1057(2) ZPO).[234] § 1057 ZPO assigns the arbitral tribunal with broad discretion. The tribunal can take into consideration the circumstances of the individual case, in particular the outcome of the proceedings. For court proceedings, § 91(1) ZPO states that, the failing party shall bear the costs. In arbitral proceedings a decision in application of the principles laid down in §§ 91 et seq. ZPO will regularly suffice. However, the arbitral tribunal is not obliged to decide according to these standards.[235] Thus, while it is possible to order the losing party to pay all the costs of the arbitration, it is not mandatory. If there are no convincing reasons to order one party to pay the costs, they shall be divided equally between the parties.[236]

Parties are only able to recover fees paid and costs incurred if they were necessary for the proper pursuit of the claim or the defence. Such necessary costs are e.g. expenses incurred by the parties for attending hearings. Lawyers' fees are also recoverable.[237]

h) Current Trends

Arbitration institutions in Germany have taken some steps to address current trends in arbitration.

The DIS Rules already foresee electronic transmission to the DIS as the standard procedure. Due to the Covid-19 pandemic, the DIS published the "Announcement of Particular Procedural Features for the Administration of Arbitrations in View of the Covid-19 Pandemic"[238] which requested all participants in DIS proceedings to continue communicating in with the DIS primarily in electronic form. Also, the DIS Rules foresee rules on expedited proceedings (Annex 4 of the DIS Rules). In 2018, the DIS introduced some rules concerning "Multi-Contract Arbitration" as a reaction to the fact that economic disputes often pertain to more than two parties and to the experiences in practice. Further, the rules have been introduced with the intention of offering

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233 *Kröll*, in: Bosman (ed.), p. 1 (47 et seq.).
234 *von Schlabrendorff/Sessler*, in: Böckstiegel/Kröll/Nacimiento (eds.), § 1057, mn. 4; for more information on the costs of arbitration, see the same mn. 5 et seqq.
235 *Voit*, in: Musielak/Voit (eds.), § 1057 ZPO, mn. 3.
236 *Schlosser*, in: Bork/Roth (eds.) Stein/Jonas ZPO, Vor § 1025 ZPO, mn. 81.
237 *von Schlabrendorff/Sessler*, in: Böckstiegel/Kröll/Nacimiento (eds.), § 1057, mn. 16, 17 and 19.
238 See https://www.disarb.org/en/about-us/update-covid-19 (17/04/2023).

users a procedural framework allowing disputes arising from multiple contracts to be resolved in a single arbitration.

Generally, after 2 years of the pandemic other topics are once again moving into the focus of arbitration. Worth mentioning are "Diversity", "Greener Arbitration", "Digitalisation" of arbitration proceedings and the "Efficiency" of arbitration.[239] These are issues that affect all places and institutions of arbitration.

3. Investment Arbitration

The German Arbitration Law contained in the tenth book of the ZPO applies to both commercial and investment arbitration. Germany has concluded what is considered to be the first modern bilateral investment treaty (BIT) with Pakistan in 1959.[240] This first BIT was concluded by Germany as a result of its economic recovery after World War II leading to new flows of outward investments.[241] In that time, decolonizing states were increasingly questioning the existing rules of customary international law for the protection of alien property.[242] 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.[243] Until today, it has concluded a total number of 155 BITs, 114 of which are currently in force.[244] Many of these treaties are based on a German Model BIT that was used as a starting point for the negotiations. The first German Model BIT was adopted around 1960 and has been continuously revised since then, the last time in 2009.[245] The Model BIT, which reflects the traditional 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.[246]

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239 See on this *Wilske/Markert/Ebert*, SchiedsVZ (2022), p. 111.

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

241 *Dolzer/Kim*, in: Chester Brown (ed.), p. 293.

242 Ibid.

243 *Fürracker*, 4 German Arbitration Journal (2006), p. 237.

244 See https://investmentpolicy.unctad.org/international-investment-agreements/countries/78/germany (18/04/2023).

245 See https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2865/download (18/04/2023).

246 *Bücheler/Flecke-Giammarco*, ICLG Investor-State Arbitration Laws and Regulations 2021 – Germany, available at

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 national treatment (Article 3) and compensation in case of expropriation (Article 4), among others. The Model BIT also foresees both state-to-state (Article 9) and investor-state dispute settlement (Article 10). In addition, Germany is a contracting party to the Energy Charter Treaty since 1994 and 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).[247]

Germany's place in the investment protection regime, both as pioneer and as the state with the highest number of concluded BITs, was changed with the entry into force of the Treaty of Lisbon in 2009[248]. As described above (C.I.2), the Treaty of Lisbon extended the Common Commercial Policy of the European Union to foreign direct investment (Article 207(1) TFEU). Since then, Germany's approach to investment treaty arbitration must be in line with the EU constitutional framework.[249]

As a result of the competence shift, Germany is no longer competent to conclude new treaties on foreign direct investment with third states without prior permission by the EU Commission.[250] In December 2012, the EU adopted Regulation 1219/2012[251] 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. Notably, 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. The fact that such treaty has not yet entered into force may be due to the aforementioned conditions required by the EU for the conclusion of new BITs with third countries.[252] In

https://idg.com/practice-areas/investor-state-arbitration-laws-and-regulations/germany (18/04/2023), para 1.1.

247 See https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XXII-3&chapter=22&dang=_en (18/04/2023).

248 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 on 1 December 2009).

249 *Bungenberg*, in: de Mestral (ed.), p. 259, 262.

250 According to Artide 2(1) TFEU, "[w]hen the Treaties confer on the Union exdusive competences 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".

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

252 *Bücheler/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 (18/04/2023), para 1.2.

2010, Germany has signed two additional BITs with Iraq and Congo, which have equally not entered into force so far.

According to the date provided by UNCTAD, there have been a total of 5 publicly known investment arbitration cases against Germany as a respondent host state. Three of these cases were brought pursuant to the Energy Charter Treaty and were administered by ICSID.

Short Case Name	**Home State of the Investor**	**Year of Initiation**	**Outcome**
Mainstream Renewable and others v Germany	Ireland	2021	Pending
Strabag and others v Germany[253]	Austria	2019	Pending
Vattenfall v Germany (II)[254]	Sweden	2012	Settled
Vattenfall v Germany (I)[255]	Sweden	2009	Settled
Sancheti v Germany[256]	India	2000	Settled

In contrast to the rather few cases brought against Germany as a respondent state, there are 78 known cases, in which German investors initiated an arbitration against the host state of their investment. The first of these cases was submitted to arbitration in 1994. In 2021, four new cases were commenced by German investors, one against Egypt,[257] two against the Netherlands,[258] and one against Spain.[259] Three of them are still pending at the time of writing and one was discontin-

253 Erste Nordsee-Offshore Holding GmbH, Strabag SE, Zweite Nordsee-Offshore Holding GmbH v Federal Republic of Germany, ICSID Case No. ARB/19/29.
254 Vattenfall AB and others v Federal Republic of Germany, ICSID Case No. ARB/12/12.
255 Vattenfall AB, Vattenfall Europe Generation AG v Federal Republic of Germany, ICSID Case No. ARB/09/6.
256 No further publidy available data.
257 HeidelbergCement and others v Egypt, ICSID Case No. ARB/21/50.
258 *RWE v Netherlands*, ICSID Case No. ARB/21/4; and Uniper v Netherlands, ICSID Case No. ARB/21/22.
259 *TS Villalba and others v Spain*, ICSID Case No. ARB/21/43.

ued. In 2022, a German investor brought a new claim arising out of a series of energy reforms in the renewables sector against Spain.[260]

4. Mediation

(a) General Background and Mediation Practice in Germany

Since the inception of the Code of Civil Procedure, the judge or court has had the authority to try and resolve the dispute amicably or refer the parties to a delegated or requested judge for conciliation. This provision can be traced back to § 279 I ZPO, which was rephrased from a discretionary to a mandatory wording in 1979 but should not be interpreted as an obligation for conciliation. The option of introducing such an obligation was provided by the law on the promotion of alternative dispute resolution in 2000 and § 15a of the EGZPO, which enables federal states to incorporate a mandatory extrajudicial process for settling disputes in specific areas before resorting to the court. Most states have taken advantage of this opportunity. An obligatory procedure is also stipulated in the realms of labor law, intellectual property, property, and insolvency. Since 2012, the Law for the Promotion of Mediation and Other Procedures for Extrajudicial/Alternative Settlement of Disputes has been based on § 278a ZPO, which was included in the second part of the law. It states:

> *"(1) The court may propose mediation or another out-of-court dispute resolution procedure to the parties.*
>
> *(2) If the parties decide to conduct mediation or another out-of-court dispute resolution procedure, the court shall order the suspension of the proceedings."*

Moreover, the law on mediation (*Mediationsgesetz*) regulates the mediation procedure but also implements Directive 2008/52/EG of the European Parliament and of the Council of 21 May 2008, which regulates mediation in cross-border conflicts.

In addition, the law on alternative dispute resolution in consumer cases (*Verbraucherbeilegungsgesetz*) regulates since 2016 mediation in consumer cases, including online mediation.

Furthermore, the family law (*Familiengesetz*) and the labour law (*Arbeitsgesetz*) also provide various rules on alternative dispute resolution due to its purpose to find a solution which is acceptable by both parties.

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[260] WOC Photovoltaik and others v Spain, ICSID Case No. ARB/22/12.

Moreover, also the social as well as the administrative law procedures allow the use of the mediation procedure according to the ZPO.[261]

Regarding the actual practice of mediation in the country, according to the report of the federal government about the development of mediation in Germany as of 2012 the potential of alternative dispute resolution has not been used intensively. The number of mediation cases is still limited and the use of the procedure foreseen in § 278 ZPO remained less than 2% in average of cases at all levels of the procedures. Most of the mediations undertaken have been internal dispute settlements in companies or other institutions. Other areas are family and partnership disputes, neighbourhood conflicts and business-to-business cases. One main reason for the small number of mediation cases are the limited possibilities for a solid income and that this opportunity is barely known among the parties.[262]

The legislator tries to support the importance of mediation by providing legal aid also in medaiton cases with the law on aid for mediation (*Mediationskostenhilfe*).

(b) Mediation-Eligible Disputes

In Germany, parties in conflict can seek mediation voluntarily and independently to reach a mutually agreeable solution with the assistance of a neutral third party. This process is confidential and structured and can be applied to a wide range of disputes between natural and legal persons, including those involving holders of sovereign powers, regardless of whether they are domestic or cross-border conflicts. This primarily concerns conflicts that exist between the parties independently of the question of a possible judicial resolution and can affect (almost) all life situations, starting with disputes between natural persons/legal persons under private law, to disputes between natural persons/legal persons under private law and legal persons under public law (holders of sovereign powers) to disputes between legal persons under public law (holders of sovereign powers). It does not matter whether the dispute is national or cross-border. The broadness of the term "mediation" corresponds to the legislator's aim of to encourage extrajudicial conflict resolution and promote a culture of dispute resolution among citizens and professionals.

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261 Cf. *Fritz* et al., Handbuch zum Mediationsgesetz, B. Einleitung, rec. 8 et seq.

262 Bericht der Bundesregierung über die Auswirkungden des Mediationsgesetzes auf die Entwicklung der Mediation in Deutschland und über die Situation der Aus- und Fortbildung der Mediatoren, Juliy 2017, p. 48 et seq.

However, even if a conflict has already been brought before a court, conflict resolution within the framework of mediation is (still) possible, whereby in principle all areas of law and all jurisdictions come into consideration. While some areas, such as parts of family law, do not typically allow for settlements through mediation, courts may propose mediation or other out-of-court conflict resolution procedures to parties. In some cases, the court may even suspend proceedings to allow for mediation, or the parties themselves can request a stay of proceedings for mediation to occur outside of the court system. This approach is known as near-court mediation. Accordingly, the courts may propose mediation (or another out-of-court conflict resolution procedure) to the parties if it is a suitable case (cf. section 278a (1) ZPO, section 36a (1) FamFG, section 54a (1) ArbGG, section 202 sentence 1 SGG, section 173 sentence 1 VwGO, section 155 FGO).[263]

(c) Mediation Agreements

Art. 1 of the Mediation Act (MA) provides that "[m]ediation is a confidential and structured procedure in which parties voluntarily and on their own responsibility seek an amicable settlement of their conflict with the help of one or more mediators." And Art. 2 foresees that "[t]he mediator shall ensure that the parties have understood the principles and process of the mediation and are participating in the mediation voluntarily."

Keeping this in mind, the mediation clause/mediation agreement is concluded between two or more persons on the fact that in the case of a conflict mediation will be carried out as a conflict resolution procedure. This is often regulated in contracts in the form of a mediation clause (e.g. instead of an arbitration clause). It is legally disputed if such a clause can be considered to refuse the claim. Some courts are in the opinion that the possibility to end the mediation any time has the effect that there is no legal binding effect for the courts involved.[264] Others follow the argumentation that the mediation clause is binding contract between the parties and the pacta-sunt-servanda principle needs to be respected so that the court should allow a certain effect for the procedure.[265]

Within the framework of a mediation agreement, the parties can establish "basic rules of procedure, communication and conduct". The mediation agreement may contain extensive rules,

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263 Cf. *Fritz* et al., Handbuch zum Mediationsgesetz, § 1 Mediationsgesetz, rec. 5 et seq.

264 OLG Frankfurt, decision of 12/05/2009, 14 Sch 4/09, NJW-RR 2010, p. 788 et seq.; LG Heilbronn, judgement of 10/09/2010, 4 O 259/09, ZKM 2011, p. 29.

265 *Greger*, in: Greger et al., § 1 MediationsG, rec. 199 et seq.

inter alia, on the personal participation of the parties in the mediation sessions, representation of communities of persons and legal entities and their competence to negotiate, participation of advisors to the parties, involvement of external experts, place and duration of the mediation as a whole, duration of individual mediation sessions, termination of the mediation, respectful treatment in joint communication, confidentiality, disclosure or non-disclosure of information and use of evidence of findings from the mediation process, the mediator's right to refuse to testify, the conduct of individual discussions and the handling of information obtained from them, questions on the preparation of minutes, dealing with proceedings already pending (e.g. court proceedings, administrative proceedings), waiving the statute of limitations defence, costs of mediation and remuneration of the mediator, information to the public, media, press releases, right of access to the mediation file, retention of documents from the mediation proceedings, sanctions for breach of agreements, monitoring the implementation of the mediation agreement.[266]

(d) Mediators

According to Art. 1 of the Mediation Act ("MA"), "[a] mediator is an independent and neutral person without decision-making power who guides the parties through the mediation." The law has been designed to accommodate future developments, but anyone who satisfies this description is subject to the obligations outlined in the legislation. While no specific educational background is required, many mediators are legal professionals such as lawyers or judges, as well as tax counselors, psychologists, teachers, priests, and doctors, who are bound by their own codes of conduct.

Additionally, Art. 2 provides for the possibility of certified mediators, whereas all other mediators must meet the basic knowledge and competence requirements laid out in Art. 5(1) of the MA.

(e) The Legal Effect of Mediation Settlement Agreements

This provision assumes that parties have reached an agreement if they have resolved the conflict through mediation and have determined how to deal with it in the future, if necessary. If the parties agree to try another conflict resolution method after finding mediation unsuitable, that also counts as an agreement. However, the agreement must have a regulatory content, or else it

[266] Cf. *Fritz* et al., Handbuch zum Mediationsgesetz, § 2 Mediationsgesetz, rec. 17 et seq.

would be meaningless. Simply expressing a unanimous desire for something to change does not constitute an agreement because it lacks concrete mutual obligations. An agreement should be specific enough to derive action or refraining from action from it, and it should ultimately lead to a settlement between the parties.

An agreement is a binding arrangement between parties that regulates specific points and is voluntarily concluded. Declarations of intent in the same direction establish a contractual relationship that is subject to their free determination with regards to both the conclusion and the content. While the conclusion of the agreement can be informal and even oral, it is advisable to create a written mediation settlement agreement for two reasons: to capture the scope of agreed solutions and obligations, and to make the agreement verifiable in the future. A written agreement also has a psychological effect on the parties, as it represents a visible conclusion of the mediation process and increases the appreciation and acceptance of the jointly developed solution. Signing the written agreement has a symbolic value for the parties and increases the binding force of the agreement while also protecting against possible memory lapses and ensuring future implementation.[267]

(f) Enforcement of a Mediation Settlement Agreement

A mediation settlement agreement usually contains the agreed arrangements between the parties which was designed either alone or together with the mediator. Again, also this is a contract except the agreed content is not enforceable. The parties decide about the form but have to be aware that some obligations needs a written and notarially certified form.

The compulsory enforceability outside a court procedure can be included in three different ways: (1) As said via notarially certification according to § 794 (1) Nr. 5 ZPO, in a settlement reached among attorneys and deposited at the local court which declares the enforceability (§796a ZPO) and in a settlement reached before a dispute resolution entity established and recognised by the Land department of justice according to § 794 (1) Nr. 1 ZPO.

(g) Challenge of a Mediation Settlement Agreement

[267] Cf. *Fritz* et al., Handbuch zum Mediationsgesetz, § 2 Mediationsgesetz, rec. 159 et seq.

(h) Germany and the Singapore Convention on Mediation

So far Germany has not signed the Singapore Convention on Mediation.

5. Public Procurement Rules in the Field of Legal Services

In connection with the subject area of dispute resolution, the question may arise as to how public contracting authorities, such as states, select their legal counsels and wether they have to conduct a procurement procedure to do so. Legal provisions on the awarding of public contracts (and concessions) can be found in the Competition Act (*Gesetz gegen Wettbewerbsbeschränkungen – GWB*) in §§ 97 ff. The second section, §§ 115 – 135 GWB, regulates the typical public procurement.[268] In this context, § 116 GWB lists cases in which the rules on the award of public contracts by contracting authorities do not apply and thereby excludes certain areas from the scope of application of public procurement law. Since 2016[269] this also applies to legal services. § 116(1) reads:

> "*(1) This Part shall not apply to the award of public contracts by public contracting authorities if these contracts have the following subject matter:*
>
> *1. legal services that concern one of the following activities:*
>
> *a) representation of a client by a lawyer in*
>
> *aa) judicial or administrative proceedings before national or international courts, public authorities or institutions;*
>
> *bb) national or international arbitration or conciliation proceedings;*
>
> *b) legal advice given by a lawyer in preparation for a proceeding within the meaning of a) or where there are specific indications and a high probability that the matter to which the legal representation relates will become the subject of such a proceeding […].*"

The public procurement law is therefore not applicable if a lawyer represents clients in court proceedings, administrative proceedings or in arbitral proceedings. Whether this also includes representation in mediation is questionable, but can be assumed.[270] In addition, public procurement law is not only inapplicable in cases of legal representation by a lawyer, but already in the context of legal advice given by a lawyer, which serves the preparation of proceedings.

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268 *Hövelberndt*, in: Reidt/Stickler/Glahs (eds.), § 115 GWB, mn. 1.

269 § 116(1) no. 1 was newly introduced in 2016 and implements Art. 10(d) of the Public Procurement Directive 2014/24/EU.

270 *Dreher*, in: Körber/Schweitzer/Zimmer (eds.), Immenga/Mestmäcker, WettbR, § 116 GWB, mn. 13; *Hövelberndt*, in: Reidt/Stickler/Glahs (eds.), § 116 GWB, mn. 24.

Hence, not all legal services are excluded from the scope of application of public procurement law. A connection to one of the above-mentioned procedures is necessary.[271] Provided that the requirements of the provision are met, there is no need to conduct a procurement procedure for the appointment of lawyers. § 107 GWB which applies to all types of public procurement, also provides for exceptions to the scope of application of public procurement law. Arbitration and conciliation services are excluded from the scope of application, § 107(1) no. 1 GWB. § 107(1) no. 1 GWB covers the services of arbitrators and conciliators and related matters, for example, expert services for the preparation of an arbitral award.[272]

II. North Macedonia

1. Judicial System

(a) The Civil Court System in North Macedonia

In the Republic of North Macedonia, the judicial power is exercised by the basic courts, courts of appeal, the Administrative Court, the Higher Administrative Court, and the Supreme Court of the Republic of North Macedonia.

Within the civil court system, the judicial power is exercised by the basic courts, courts of appeal, and the Supreme Court of the Republic of North Macedonia.

The civil court system includes 26 basic courts[273] and 4 courts of appeal[274], each established with its own territorial jurisdiction. Regarding the subject matter jurisdiction, the basic courts are competent in civil and commercial matters and are divided into basic courts with basic subject matter competence and basic courts with extended subject matter competence.

The basic courts with basic subject matter competence decide upon property law and other civil law relations of natural and legal persons in which the value of the dispute is up to 50.000 EUR, if the jurisdiction of another court is not provided by law. Basic subject matter jurisdiction courts may also decide upon disputes on establishing and contesting paternity, maternity, establishing the existence of marriage, annulment of marriage and divorce, alimony, parenting and upbringing

271 *Dreher*, in: Körber/Schweitzer/Zimmer (eds.), Immenga/Mestmäcker, WettbR, § 116 GWB, mn. 17.

272 *Ganske*, in: Reidt/Stickler/Glahs (eds.), § 107 GWB, mn. 7.

273 Basic Court in Berovo, Basic Court in Bitola, Basic Court in Vinica, Basic Court in Veles, Basic Court in Gevgelija, Basic Court in Gostivar, Basic Court in Debar, Basic Court in Delcevo, Basic Court in Kavadarci, Basic Court in Kicevo, Basic Court in Kocani, Basic Court in Kratovo, Basic Court in Kriva Palanka, Basic Court in Kumanovo, Basic Court in Negotino, Basic Court in Ohrid, Basic Court in Prilep, Basic Court in Radovis, Basic Court in Resen, Basic Court in Sveti Nikole, Basic Civil Court in Skopje, Basic Court in Strumica, Basic Court in Tetovo and Basic Court in Shtip.

274 Court of Appeals in Skopje, Court of Appeals in Bitola, Court of Appeals in Gostivar and Court of Appeals in Shtip.

children, lifelong support, disturbance of possession, compensation of damages up to 50.000 EUR, securing and enforcement procedure, labor disputes, inheritance disputes, non-contentious and inheritance matters, and other matters stipulated by law.[275] The basic courts with extended subject matter competence decide upon property law and other civil law relations of natural and legal persons in which the value of the dispute is over 50.000 EUR, if the jurisdiction of another court is not provided by law, as well as in commercial disputes in which both parties are legal entities or state bodies, copyrights and other related rights and industrial property rights, bankruptcy and liquidation proceedings, disputes for determination and securing coercive enforcement, and disputes between domestic legal and foreign entities that arise from their mutual commercial/trade relations.[276]

The courts of appeal decide upon appeals against the decisions of the basic courts of their territory, upon conflict of competences between the courts of first instance on their territory and carry out other activities defined by law.[277]

The Supreme Court of the Republic of North Macedonia decides in second instance against the decisions of its councils (when determined by law); in third and last instance upon appeals against the decisions of the courts of appeal; upon extraordinary legal remedies against the legally valid decisions of the courts and the decisions of its councils (when determined by law) upon conflict of competences and transfer of territorial competence among the lower courts; and upon request of the parties and other participants in the procedure for violation of the right to trial within a reasonable period of time.[278]

Judges

Judges are appointed by the Judicial Council of the Republic of North Macedonia.

The Judicial Council is composed of 15 members,[279] of which: *ex officio* members of the Council are the President of the Supreme Court of the Republic of North Macedonia and the Minister of Justice who have no voting rights; 8 (eight) members of the Council are elected among the judges; 3 (three) members of the Council are elected by the Assembly of the Republic of North

[275] See Art. 30 (2) of the Law on Courts („Official Gazette of the Republic of Macedonia no. 58/06, 62/06, 35/08, 150/10, 83/18, 198/18" and „Official Gazette of the Republic of North Macedonia" no. 96/19.
[276] See Art. 31 (2) of the Law on Courts.
[277] See Art. 33 of the Law on Courts.
[278] See Art. 35 of the Law on Courts.
[279] Artide 6 of the law on the Judicial Council of the Republic of North Macedonia.

Macedonia; and 2 (two) members of the Council are nominated by the President of the Republic of North Macedonia, and they are elected by the Assembly of the Republic of North Macedonia.

A person may be appointed as a judge if they meet the following requirements:[280] is a citizen of the Republic of North Macedonia; is proficient in the Macedonian language; has a general work capacity and is in good general health condition, certified by a medical practitioner; has completed legal studies and has acquired 300 ECTS or VII/1 level of legal studies or has validated a diploma in legal studies acquired abroad with 300 ECTS; has passed the bar exam in the Republic of North Macedonia; has knowledge of one of the three most used languages of the European Union (English, French or German); at the time of appointment, is not banned from practicing law by a legal valid court judgment, or has not been pronounced guilty for any crime for which imprisonment of at least six months is prescribed; has computers skills, and possesses integrity and social skills to exercise the judicial office, for which integrity and psychological tests are conducted.

A special precondition for appointment of a judge is that the person must have completed a training in the Academy for Judges and Public Prosecutors determined by a law.[281]

Provisions regulating the judges' impartiality and conflict of interest avoidance can be found in both the Constitution of Republic of North Macedonia, and in the Law on Courts.

Amendment XXVII of the Constitution on the Republic of North Macedonia provides that "*[t]he Judicial office is incompatible with membership in a political party or performance to another public office or profession established by law.*"

The Law on Courts provides the following safeguards against conflict of interest:[282] the judicial office is incompatible with the office of a member of the parliament, a member of a council in the municipality, or in the City of Skopje, and the offices in state bodies, the municipality and the City of Skopje, except in cases foreseen by a law; the judge cannot hold any other public office or practice a profession, except an office determined by law which is not contrary to his/her independence and autonomy in the exercise of the judicial office; the judge cannot be a member of a managing or supervisory board of a trade company or another legal entity established for the purpose of gaining profit; the judge must not use their office and reputation of the court for achievement of own private interests; and the judge cannot be a member or hold a political office within a political party or carry out party or political activity.

280 Artide 45 of the Law on Courts.
281 Artide 46 of the Law on Courts.
282 Artide 52 of the Law on Courts.

A judge is removed from office by the Judicial Council of Republic of North Macedonia:

- due to serious disciplinary offense that makes them discreditable to exercise the judicial office prescribed by law and
- due to unprofessional and neglectful exercise of the judicial office under the conditions defined by law.[283]

(b) Overview of the Conduct of Civil Proceedings in North Macedonia

The civil proceedings in North Macedonia are organized in several instances, stages and phases. Whether a particular litigation will go through all the instances, stages and phases, depends on whether there is a legal availability of a certain instance, stage or phase of the particular litigation, and it depends on the will of the parties.[284]

The CPA entails general provisions for civil proceedings, as well as special provisions for certain types of civil proceedings. Hence, in the civil law system there is the so called "general civil proceedings" or "regular civil proceedings" and "special civil proceedings".[285] Special civil proceedings are conducted for labor disputes, disturbance of possession, payment orders, small value disputes, commercial disputes and family disputes.

In general, filling a lawsuit marks the initiation of the first instance civil proceedings. When the court receives the lawsuit, it conducts preliminary assessment, and if the preliminary assessment of the lawsuit is successful, it delivers the lawsuit to the defendant for response and schedules a preliminary hearing. After the preliminary hearing, a main hearing is scheduled. The main hearing is the central stage of the litigation. When the main hearing is closed, the last stage of the litigation is rendering a decision by the court.

If a party deems that the first instance decision is unjust and/or inappropriate, it may, in a certain time period[286] file an appeal against the decision to the competent court of appeal as the second instance court. If there is no appeal against the decision, it becomes final and binding after the expiry of the time period for submitting the appeal.

In case of an appeal against the decision, the second instance court conducts assessment on whether the decision is just and/or appropriate, and depending on the outcome of the

283 Artide 74 of the Law on Courts.
284 Janevski/Zoroska-Kamilovska, p. 65.
285 The rules of the special civil proceedings are not only induded in the CPA, but also in other special laws regulating the matter of the dispute.
286 The general time limitation for submitting an appeal against a first instance court decision is 15 days.

assessment, it may confirm the decision, annul the decision, or amend the decision. If the second instance court confirms or amends the decision, the decision becomes final and binding.

Against a final and binding court decision, in certain cases as provided by law as well as if certain conditions provided by law are met, the final and binding decision may be challenged with extraordinary legal remedies, that is, revision and/or repetition of the proceedings before the Supreme Court of the Republic of North Macedonia.

Regarding limitations periods for ruling, the CPA prescribes limitation periods for ruling in labor disputes and disputes for disturbance of possession providing that the first instance court must rule upon the case in 6 months.

The CPA stipulates general limitation periods for ruling of the second instance court, that is, 3 months or 6 months for more complex cases from the day of the receipt of the appeal.[287] For labor disputes and disputes for disturbance of possession, the second instance court must render a decision in 30 days from the day of the receipt of the appeal.

The limitation periods provided by law are usually not adhered to by the courts.

Limitation periods

A statement of claim (lawsuit) may be dismissed if the court finds that it is submitted untimely, that is, if special acts provide for a limitation period for initiating a lawsuit.[288]

The limitation period is determined by the nature of the claim. Certain laws explicitly prescribe the limitation period for submission of a lawsuit, while other laws provide for substantive limitation periods of the claim.

In this sense, some laws may prescribe limitation periods for seeking court protection, as for example, the Law on Labour Relations ("LLR") which prescribes time limitation periods for court protection in cases of dismissal, that is, by providing that the right of the employee to seek court protection against the decision for dismissal is 15 days after the receipt of the decision upon appeal by the employer.[289] Another example would be the time limitation periods for court protection stipulated in the Law on Civil Liability for Insult and Defamation ("LCLID") in which it is provided that "*[t]he time period for filing a lawsuit under this law is three months from the day that the plaintiff found out or ought to have found out about the insulting or defaming statement and the identity of the*

[287] See Art. 355-a of the CPA.
[288] See Art. 247 of the CPA.
[289] See Art. 181 of the LLR.

person who caused the damage, but no later than one year after the day when the statement is issued before a third party".

On the other hand, the LO provides a general limitation period of five years for claims.[290] However, in case of a time-barred claim under a substantive limitation period, the court will conduct the proceedings and it will not dismiss the claim as untimely, but it would reject the claim as unfounded due to time bar of the claim only if such objection is raised by the other party.

Statement of Claim (Lawsuit)

A statement of claim (lawsuit) is the first and initial procedural action for commencing the proceedings. The content and mandatory elements of a lawsuit are explicitly provided in the CPA.[291] Namely, the CPA prescribes that the lawsuit must contain:

a) a request for relief (petitum), that is, claims in terms of the main issue and the secondary claims, if any;
b) facts upon which the plaintiff bases its claim;
c) evidence to prove such facts;
d) information and data required by law[292] for any court submission, such as: title of the court; identification data of the parties including information of residence and relevant proofs; information for the legal representatives, that is, proxies, if any; the subject matter of the dispute, the value of the dispute; statement and signature; contact information, that is, e-mail and contact phone number of the plaintiff.

In the event that a filed lawsuit lacks any of the elements prescribed by law, and if the lawsuit was filed by an attorney at law, the court may dismiss it. If the lawsuit lacks any of the elements prescribed by law, but it was filed by the party itself, the court shall grant an additional time period to the party to remedy the defects.

A lawsuit may be of a declaratory, constitutive, or condemnatory nature. In one lawsuit, the plaintiff may cumulate more than one claim, for which it may raise more than one claim and request the court to: a) accept all of the claims (so called "regular cumulation"); b) accept the first claim, and if it finds it is unfounded, to accept the second claim, and so on depending on the

290 See Art. 360 of the LO.
291 See Art. 176 of the CPA.
292 See Art. 98 of the CPA.

number of raised claims (so called "eventual cumulation"); or c) accept any of the raised claims (so called "alternative cumulation").

After the submission of the lawsuit, the statement of claim can be both amended and withdrawn. However, both actions are not possible at any stage of proceedings. In this sense, the statement of claim may be amended at the first session of the main hearing at the latest. After the lawsuit was delivered to the defendant, the defendant's consent for amendment is required. However, even in case the defendant opposes, the court may approve amendment of the lawsuit should it consider that it would be purposeful for the final resolution of the parties' relations.
A lawsuit may be withdrawn without the consent of the defendant before commencing contention on the main issue. In case the lawsuit is withdrawn at a later stage of the proceedings, the defendant would have to agree to the withdrawal. In case of withdrawal of the lawsuit, the court shall by decision discontinue the proceedings.[293] The withdrawn lawsuit shall be considered as if it has not been filed and it can be filed again.[294]

Statement of Defence (Response to Lawsuit)

After the preliminary inspection of the lawsuit, if the court finds that it contains all the mandatory elements, it will deliver the lawsuit to the defendant for response along with summons for a preliminary hearing. In the summons wherefore a lawsuit is delivered to the defendant, the court determines the period in which the defendant is obliged to provide a statement of defence, i.e. a response to the lawsuit. In principle, for the general civil proceedings, this period cannot be shorter than 15 days or longer than 30 days as of the day of receipt of the lawsuit.[295]

According to the CPA, the statement of defence must include: a statement of the defendant as to the requests and claims made by the plaintiff; if the defendant opposes the plaintiff's claims, the defendant should also provide a statement of facts and supporting evidence.[296]

Counterclaims are allowed. The defendant may file a counterclaim at the first session of the main hearing at latest. The defendant can file a counterclaim even at a later stage of the proceedings, until the closure of the main hearing, but only with the consent of the plaintiff, or if the court has

[293] Janevski/Zoroska-Kamilovska, p. 283
[294] See Art. 183 of the CPA.
[295] Artide 269 (2) of the CPA. It should be noted that for special civil procedures (such as, disturbance of possession and labour disputes) the time period for response granted to the defendant is shorter.
[296] See Art. 269 and Art. 270 of the CPA.

approved an amendment of the lawsuit before the closure of the main mearing despite the defendant opposing such amendment.[297]

If the defendant does not submit a response to the lawsuit in the determined time period, the court may render a decision by which it adopts the statement of claims (judgment due to not filing response to a lawsuit), if certain conditions are met.[298]
The court's jurisdiction may be contested by the defendant until the pre-trial hearing, or if a pre-trial has not been held, until the defendant enters into contesting the main issue at the first hearing for the main hearing.[299]

Third-Party Intervention

Third-party intervention in civil proceedings is possible. A third party who has legal interest for one party to succeed in litigation ongoing between other persons can join the referred party. Such third party may enter a litigation in the course of the whole procedure before the decision upon the petition becomes legally valid, as well as in the time periods anticipated for filing an extraordinary legal remedy. The third party concerned for joining the proceedings must provide a statement on entering the ongoing proceedings before the court at a hearing or in a written submission.[300]

The submission of the third party (intervenor) shall be served to both parties. Each party can contest the intervenor's right to participate in the procedure and can propose to the court to reject the request for intervention.

The court may reject the participation of the intervenor without any request of the parties in case if it determines that the intervenor has no legal interest in the litigation. Until the determination rejecting the participation of the intervenor becomes legally valid, the intervenor can participate

297 Artide 179 of the Civil Procedure Act.
298 The conditions for rendering a judgement due to not filing a response to the lawsuit are the following: the defendant was duly served with the statement of daim and the summons for giving response to the statement of daim; the grounds of the petition result from the facts listed in the statement of daim; the facts on which the petition is based are not contrary to the evidence submitted by the plaintiff or to the generally known facts; and there are no generally known circumstances from which it results that the defendant due to justified reasons was prevented from filing a statement of defence.
299 Artide 16 of the Civil Procedure Act.
300 Art. 194 of the CPA.

in the procedure and his litigation activities cannot be excluded. A special appeal is allowed against the decision of the court wherefore the participation of the intervenor is accepted.[301]

Consolidation of Proceedings

Consolidation of proceedings in civil proceedings is possible. Namely, if several litigations between the same persons are ongoing in the same court, or if the one person is opposing party to different plaintiffs and defendants, all such litigations can be consolidated with a court's determination for the purpose of joint proceedings if such action would accelerate the proceedings and decrease the costs.

For consolidated proceedings, the court can reach a joint decision.

Discontinuation and Stay of the Proceedings

According to the CPA, the court has powers to discontinue and stay the proceedings. The courts may stay the proceedings when:[302] a party dies; a party loses the litigation capacity, and has no proxy in the procedure; the legal representative of the party either dies or loses their representing authorization, and the party has no proxy in the procedure; a legal entity ceases to exist, i.e. a competent body decides in a legally valid manner to prohibit its work; legal consequences from opening a bankruptcy procedure occur; both parties request so due to dispute settlement via mediation or in another manner; there is war or other reasons appear that terminate the work of the court; other situations determined by law occur; the court decides not to decide on its own upon an previous issue; the decision on the petition depends on whether a misdemeanor or a crime prosecuted *ex officio* has been committed, who is the offender and whether they are liable, and particularly when suspicion arises that the witness or the expert witness has given false statement or that the document used as evidence is false; and the party is in an area which due to floods, other accidents and alike is cut off from the court.

The court shall discontinue the proceedings when: the plaintiff withdraws the lawsuit;[303] the parties settle;[304] during the proceedings determine that the procedure is to be conducted according to the rules of the non-contentious procedure. After the legal validity of such decision,

301 Art. 195 of the CPA.
302 Art. 200 and Art. 201 of the CPA.
303 Janevski/Zoroska-Kamilovska, p. 283.
304 Janevski/Zoroska-Kamilovska, p. 341.

the procedure shall continue with a competent court according to the rules of the non-contentious procedure.[305]

Rules on Evidence

Each party is obliged to state the facts and propose evidence on which it bases its claim or by which it abnegates the allegations and evidence of the opposing party.[306] The parties are obliged to state all the facts and evidence on which they base their allegations, as well as to submit the documents and items they intend to use as evidence in the pre-trial hearing at the latest. In the summons for the pre-trial hearing the parties shall be ordered to bring to the hearing all the documents that serve as evidence for them, as well as all the items the court shall inspect.

The following types of evidence are admissible in civil proceedings:

a. Inspection;[307]
b. Documents;[308]
c. Witnesses; and
d. Expert witnessing. The court shall exhibit the evidence by providing expertise on a proposal of the party, when due to confirming or clarifying certain fact, professional knowledge that the court lacks is necessary;[309] and
e. Party examination. The court can decide to exhibit evidence by examining the parties when there is no other evidence or even beside the exhibited evidence it is necessary to establish important facts.[310]

The parties can state new facts and propose new evidence, as well as address submissions containing new facts and new evidence at the first or any other following hearing on the main

305 Article 18 (1) of the Civil Procedure Act.
306 Article 205 (1) of the Civil Procedure Act.
307 Inspection shall be undertaken only on a proposal of the party when for establishment of certain fact or clarification of certain circumstance direct note of the court is necessary. The inspection may be performed with the participation of expert witnesses provided by the party proposing the inspection. Article 212 of the Civil Procedure Act.
308 Electronic documents are also admissible. The Law on Electronic Communications, Electronic Identification and Confidential Services contains an explicit provision that an electronic document cannot be contested and challenged as evidence in administrative or court proceedings, merely because it is in electronic form.
309 Article 235 (1) of the Civil Procedure Act.
310 Article 249(2) of the Civil Procedure Act.

hearing, only if they render it possible that they were in no condition to propose such evidence at a previous stage of the proceedings, without their fault.[311]

The rules of disclosure in civil proceedings in North Macedonia are prescribed in Articles 217-a, 217-b, 217-c (217-в), 218, 219, 222 and 223 of the CPA. There are no special rules regarding the disclosure of electronic documents. It should be noted that the Law on Electronic Communications, Electronic Identification and Confidential Services[312] contains an explicit provision that an electronic document cannot be contested and challenged as evidence in administrative or court proceedings, merely because it is in electronic form.

The opposing party or a third party may be ordered by the court to disclose a document that it has in its control. Before the court issues the order for disclosure, it shall give the party the opportunity to respond to the disclosure request. When the opposing party or the third party denies that it holds the document, for the purpose of confirming this fact, the court can exhibit evidence. The third party is entitled to compensation of the costs it has had in regard to the document disclosure.

However, a party to civil proceedings or a third party who is required to disclose a document may, in certain cases,[313] refuse disclosure.

Court Decisions

In civil proceedings, the court may render judgments, orders and decisions. In principle, courts decide on the merits of the dispute by a judgment. All other interlocutory matters and procedural issues are decided by issuance of court orders and court decisions.

The types of judgments the court may adopt are:

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311 Artide 284 of the Civil Procedure Act.

312 Law on Electronic Communications, Electronic Identification and Confidential Services (Official Gazette of RN Macedonia nos. 101/2019 and 275/2019).

313 The party may refuse disdosure in the following cases: the document contains a business secret or another confidential trade or financial information; the document is protected by the industrial property right: patent, industrial design, brand, mark of origin and geographical mark; the document is protected by particular professional authorizations or a business secret in accordance with the Law on Law Practice, the Law on Notary Practice, and the Law on Health Protection; the document contains a state secret; there is a reasonable possibility that the document is lost or destroyed; the access to the document is restricted or prohibited by law; and the privacy of the party or of any other natural person might be violated by the access to the document; there are strong reasons not to disdose the document, particularly if the document would expose him or his relatives by blood in direct line to whatsoever degree, and in indirect line to the third degree, his spouse or in-laws up to the second degree to shame, significant material damage or criminal prosecution, as well as when the marriage is terminated, the unwed partner, and the guardian or the person under guardianship, the adoptive parent or the adoptee.

a. partial judgment, when only part of the lawsuit has reached a phase for adopting a final decision;[314]

b. interlocutory judgment, when only the basis of the lawsuit, and not the monetary aspect, has reached a phase for adopting a final decision;[315]

c. judgment based on admittance;[316]

d. judgment based on withdrawal, when the plaintiff withdraws its lawsuit;[317]

e. judgment due to failure to file a statement of defence;[318]

f. judgment due to absence, in case the defendant does not contest the petition or does not appear at the hearings.[319]

Costs

Costs of civil court proceedings include any costs incurred during or due to the proceedings. Such costs include court fees,[320] personal expenses by the party and its representative incurred for showing before the court, attorney's fees,[321] travel expenses, per diem and loss of profit for the witnesses and expert witnesses, fees for expert witnesses, expenses for inspection hearings, expenses for collecting evidence before the initiation of the proceedings, expenses for an attempt for settlement, expenses for interim measures, etc.[322]

During the proceedings, costs are primarily covered by the party undertaking the action in which costs are incurred.[323] Hence, each party must fund its actions in the litigation.

If requested by any of parties,[324] the court decides which party would finally bear the costs of the proceedings. For this, the CPA incorporates two general principles: the principle of

314 Artide 315 of the Civil Procedure Act.
315 Artide 316 of the Civil Procedure Act.
316 Artide 317 of the Civil Procedure Act.
317 Artide 318 of the Civil Procedure Act.
318 Artide 319 of the Civil Procedure Act.
319 Artide 320 of the Civil Procedure Act.
320 Court fees are prescribed in the Fees Tariff incorporated in the Court Fees Act (Official Gazette of the Republic of North Macedonia no.144/09, 148/11, 106/13 and 166/14 and Official Gazette of the Republic of North Macedonia no. 257/20).
321 Attorney's fees are provided in the Tariff for compensation of attorney fees of the Macedonian Bar Association (Official Gazette of RN Macedonia, No. 13/2017, 189/2019 and 62/2019). Attorneys are not allowed to render services for fees lower than the fees prescribed in the Tariff; however they are allowed to increase the amount of the fee. Request for fees based on increased fees are usually not admitted by the courts.
322 Janevski/Zoroska-Kamilovska, p. 373.
323 According to Artide 146 of the CPA, each party primarily covers the costs incurred by its action.

causality, whereby the court considers the success of the parties in the outcome of the dispute, and the principle of fault, whereby the court considers if certain actions in the proceedings are undertaken by fault of any of the parties.

In light of this, in accordance with Article 148 of the CPA in which the principle of causality is embodied, the party who loses the litigation is obliged to reimburse the costs of the other party (and the costs of its joinder if there is one). If a party partly succeeds in the litigation, the court may consider such success and determine that each party bears its own costs, or to determine that the party reimburses a proportional party of the costs of the other party (and the costs of its joinder if there is one). However, even in case of partial success in the litigation, the court may decide that the losing party bears all costs, if the prevailing party failed in an insignificant part of its claim for which no special costs were incurred. If evidence is exhibited upon request of the court, the court determines whether such costs should be borne by any of the parties or if it will be covered by the court.

In Article 150 (1) of the CPA a general provision incorporating the principle of fault is provided, under which Regardless of the outcome of the litigation, the party shall be obliged to compensate to the opposing party the costs being caused by its fault or due to an occurrence on its part.

Claim Settlement

In general, there are two mechanisms for settlement of claims, that is:

- Mediation settlement. Such settlement is reached through mediation.
- Court settlement. Courts, during the course of proceedings, point the parties to the possibility for court settlement and help them conclude such a settlement. The person who intends to file a lawsuit can attempt to reach a settlement, through the court of first instance in the area where the opposing party has its permanent, i.e. temporary place of residence. The court where such proposal is addressed acts as facilitator and summons the opposing party and introduces it to the settlement proposal.[325]

[324] The court will not address the issue on the litigation costs if it is not requested by the parties. See Article 158 (1) of the CPA.

[325] Article 307 of the Civil Procedure Act.

Recognition and Enforcement of Foreign Judgments

The procedure for recognition and enforcement of foreign judgments is prescribed in Articles 165 to 173 of the Private International Law Act. Article 173 of the Private International Law Act provides that the enforcement of foreign judgments is made in line with legislation applicable to enforcement. Both domestic and foreign judgements are therefore enforced in line with the Law on Enforcement.

On 16 May 2023, the Minister of Justice of the Republic of North Macedonia signed the Hague Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters. The Convention must still be ratified by the Assembly of the Republic of North Macedonia in order to produce legal effect in North Macedonia.

North Macedonia is party to the following bilateral treaties regulating recognition and enforcement of foreign judgments:

- Treaty between the Republic of Macedonia and Croatia on international legal assistance in civil and criminal cases (1995). In force since 25 May 1995;
- Treaty on mutual legal cooperation between Macedonia and Turkey on civil and criminal cases (1997). In force since 31 May 1997;
- Treaty between the Republic of Macedonia and Bulgaria on legal assistance in civil cases (2002). In force since 26 February 2006;
- Treaty between the Republic of Macedonia and the Republic of Slovenia on legal assistance in civil and criminal cases (1996). In force since 5 September 1997;
- Treaty between the Republic of Macedonia and Ukraine on legal assistance in civil cases (2000). In force since 27 April 2000;
- Treaty between the Republic of Macedonia and Albania on legal assistance in civil and criminal cases (1998). In force since 10 April 1998;
- Treaty between the Republic of Macedonia and Romania on legal assistance in civil and criminal cases (2004). In force since 02 July 2004;
- Treaty between the Republic of Macedonia and Bosnia and Herzegovina on legal assistance in civil and criminal cases (2006). In force since 03 February 2006;
- Treaty between the Republic of Macedonia and Serbia on legal assistance in civil and criminal cases (2013). In force since 02 February 2013;
- Treaty between the Republic of Macedonia and Montenegro on legal assistance in civil and criminal cases (2016). In force since 26 October 2016;
- Treaty between Yugoslavia (FPRY) and the Kingdom of Greece on mutual recognition and

enforcement of judgments (1959);

- Treaty between Yugoslavia (FPRY) and the People's Republic of Poland on legal relations in civil and criminal cases (1960);
- Treaty between Yugoslavia (SFRY) and Cyprus on mutual legal assistance in civil and criminal cases (1984); and
- Treaty between Yugoslavia and the Republic of Austria on Mutual Recognition and Enforcement of the Decisions of the Selected Courts and the Settlements Concluded before the Selected Courts in Commercial Matters (190). In force since 16 May 1961.

Enforcement Procedures

In May 2005, the Parliament of the Republic of Macedonia adopted the Law on Enforcement, published in the Official Gazette of the Republic of Macedonia, No. 35/5, dated on 18 May 2005, which entered into force on 26 May 2006. This reform law introduced the private enforcement system of the executive documents by the enforcement agents, individuals with public authorizations, appointed by the Minister of Justice**.** Today, there are around 100 enforcement agents in North Macedonia.

A 2021 Report prepared by the Ministry of Justice shows that the effectiveness of enforcement of debt is gradually decreasing in the past few years. This trend can be illustrated by the annual decrease in the percentage of enforced claims:

Year	Number of claims enforcement agents received	Number of fully enforced claims	Percentage of fully enforced claims
2017	**88,723**	**56,163**	**63,30%**
2018	**112,250**	**62,515**	**55,69%**
2019	**121,812**	**57,065**	**46,84%**
2020	**101,360**	**42,233**	**41,66%**

The percentage of fully enforced claims, during the 15-year existence of private enforcement agents in Macedonia amounts to 36,48%. The Ministry of Justice's analysis demonstrates that

timewise, enforcement proceedings are also not very efficient. In 2020, the enforcement proceedings of more than 54% of fully enforced claims spanned for more than 1 year.

The number of foreign decisions enforced by enforcement agents have also decreased in recent years:

Year	2017	2018	2019	2020
Number of enforced foreign judgments	16	13	1	2

Court Case Management

Cases in courts in North Macedonian are allocated in accordance with the Law on Management of the Movement of Court Cases[326] and the Court Rules of Procedure.[327] The president of the court determines the annual work schedule of the court for each calendar year. In the annual work schedule, judges are assigned to specific departments, and it is ensured that judges act in certain specialized areas and, to the extent possible, avoid working on cases from several different legal areas.[328]

Cases from a specific legal area are allocated to judges from that respective court department by an automated computer system for management of court cases. The president of the court is responsible for the supervision over the operation of the automated computer system.

2. Commercial Arbitration

a) General Background and Arbitration Practice in the Republic of North Macedonia

In the Republic of North Macedonia, commercial arbitration is regulated by two separate laws:

- The Law on International Commercial Arbitration of the Republic of Macedonia (hereinafter LICA);[329] and
- The Civil Procedure Act (hereinafter CPA).[330]

326 Official Gazette of RN Macedonia no. 42/2020.
327 Official Gazette of R of Macedonia no. 66/2013.
328 Artide 112 of the Court Rules of Procedure.
329 The Law on International Commercial Arbitration of the Republic of Macedonia (Official Gazette of RN Macedonia, No. 39/2006), hereafter LICA.
330 Civil Procedure Act (Official Gazette of RN Macedonia, No.79/05, 110/08, 83/09, 116/10 and 124/15),

The Republic of North Macedonia does not follow the contemporary trends in arbitration law regarding the existence of unified rules that would apply both to international and internal (domestic) arbitration.

The LICA applies to international commercial arbitration if the place of arbitration is on the territory of the Republic of North Macedonia.[331] The LICA was enacted in 2006 and is predominantly based on the internationally recognized model rules of the UNCITRAL Model Law on International Commercial Arbitration of 1985 (hereinafter UNCITRAL Model Law). The current legislation has not yet implemented the amendments of the UNCITRAL Model Law of 2006.

The CPA rules apply to internal (domestic) arbitration before selected courts whose seat is in the Republic of North Macedonia.[332] Internal (domestic) arbitration is regulated by provisions stipulated with the CPA in a special chapter named Procedure before Selected Court.[333] The current legal framework is based on the old provisions of the CPA of 1976 and is waiting to be revised for quite a long time.

In the Republic of North Macedonia, the arbitral institutions function as an independent body attached to economic chambers. According to the Law on Economic Chambers from 2011, the economic chambers can establish a permanent court of arbitration (*i.e.* an arbitral institution) as an independent body within their organizational structure.[334] The attachment of an arbitral institution to a chamber of commerce is a widely recognized model which is also adopted by many leading institutions such as the ICC Arbitration, SCC Arbitration Institute as well as the Milan Chamber of Arbitration. Although there are three functional economic chambers in the country, currently only one has a fully functional permanent arbitral institution – the Economic Chamber of North Macedonia. The Permanent Court of Arbitration (hereinafter Permanent Court of Arbitration or PCA) is the only functional arbitral institution that is attached to the Economic Chamber of North Macedonia. Since 1993 it has been operating as an institution responsible for resolving both domestic disputes and disputes with an international element. Before 1993 it was an arbitral institution for resolving only domestic disputes, while international disputes were resolved by the Foreign Trade Court of Arbitration in Belgrade.

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hereafter CPA.

331 Artide 1(1) of the LICA.

332 Artide 439 of the CPA.

333 Chapter Thirty of the CPA, Artides 439–460.

334 Artides 32 & 33 of the Law on Economic Chambers (Official Gazette of RN Macedonia, No.17/2011)

According to the autonomous arbitration rules of the institution, the PCA performs its jurisdiction through several bodies: The Presidency, the President, and the Secretary of the PCA.[335] The Presidency of the PCA consist of seven members: the President, the Vice-president, and five members with no special function. They are appointed by the Managing Board of the Economic Chamber of Macedonia for a mandate period of 5 years.[336] The Arbitration Rules specify in detail the activities and responsibilities of each body regarding the functioning of the arbitral institution and administering the resolution of disputes before the PCA.[337]

The parties may agree on the PCA's jurisdiction for resolving disputes concerning rights that parties can freely dispose of and rights for which the law does not stipulate exclusive jurisdiction of the courts of the Republic of North Macedonia. In order to improve and modernize the organization and functioning of the arbitral institution and to meet the current practices in this field, in 2021 new Arbitral Rules of the Permanent Court of Arbitration attached to the Economic Chamber of North Macedonia (hereafter 2021 Skopje Arbitration Rules) were adopted.[338] These Rules regulate the organization of the PCA, the jurisdiction and the composition of the arbitral tribunals, and the rules on the procedure before the arbitral tribunals in disputes with or without international elements. The rules also contain two annexes, Annex I which regulates the organization of the PCA, and Annex II which regulates the procedure before an emergency arbitrator. Aside from the novelty of introducing the rules for an emergency arbitrator in 2021, there are no specific rules adopted by the PCA related to expedited proceedings or electronic arbitration.

At the beginning of 2022, the PCA adopted the newest rules on the costs of the proceedings. The new rules contain two major changes compared to the previous rules – firstly they significantly decrease the overall costs, and secondly, they abolish all costs calculated as a percentage of the value of the dispute. The previous rules from 2016 divide the arbitration costs into several categories – filing fees, administrative fees, arbitrator fees as well as other costs (travel costs, translation costs, costs for witnesses etc.). The filing fee was 200 euros.[339] The Arbitrator's fees were a

[335] Artide 3, of the Annex 1 to the 2021 Skopje Arbitration Rules.
[336] Artide 4(1), of the Annex 1 to the 2021 Skopje Arbitration Rules.
[337] Artides 6-10 of the Annex 1 to the 2021 Skopje Arbitration Rules.
[338] Arbitral Rules of the Permanent Court of Arbitration attached to the Economic Chamber of North Macedonia, Decision 02- 605/6, as adopted on 29 April 2021 by the Assembly of the Economic Chamber of North Macedonia, hereafter 2021 Skopje Arbitration Rules. The text of the Rules is available at: https://arbitraza.mchamber.mk/upload/АРБИТРАЖНИ ПРАВИЛА на Постојаниот избран суд-Арбитража при СКСМ.pdf (18/04/2023).
[339] Artide 8 of the Rules on the costs of the proceedings in front of the Permanent Court of Arbitration attached to the Economic Chamber of North Macedonia, No. 02-2087/3 from 15 December 2016 and the Decision for the

combination of a fixed fee and a variable fee as a percentage of the value of the dispute.[340] The fees for international arbitrations were higher than the fees for domestic arbitrations. Finally, the administrative fees were calculated as a percentage of the arbitrators' fees (40% of the arbitrator's fees if the dispute is decided by a sole arbitrator, and 20% of the arbitrators' fees if the dispute is decided by an arbitral tribunal).[341] The 2022 rules on costs decrease the filling fee to only 100 EUR, and fixes the administrative fees to 900 EUR.[342] However, the most significant amendment is that now arbitrators' fees are fixed regardless of the nature of the fispute (international or domestic) or its value. The fee for the sole arbitrator is 500 EUR, and the fee for an arbitral tribunal is 1.000 EUR (of which the president of the tribunal receives 40% and the other arbitrators 30%).[343] It remains to be seen whether this makes the arbitral institution more attractive and leads to a boost in the number of cases in the following years.

Concerning the arbitration practice, according to the data provided by the PCA, in the last seven years, 47 arbitration cases have been filed before the Court. 68% of the disputes were without an international element and 32% of the disputes had an international element. For the past seven years, most of the initiated arbitration proceedings are regarding debt collection (84%) and compensation for damage (10%). The proceedings were mainly for claims arising from sales contracts (24%), public procurement contracts (19%), and construction contracts (19%). In general, the duration of the arbitration proceedings in front of the PCA is six to nine months.[344]

Concerning *ad hoc* arbitration, there are no existing records that a dispute has been resolved in an *ad hoc* arbitration seated in the Republic of North Macedonia. According to Macedonian legislation, *ad hoc* arbitration is permitted only for international disputes,[345] while there are no such limitations related to institutional arbitration.

The promotion of arbitration in the Republic of North Macedonia is going slowly and with modest results. In the global commercial community, North Macedonia has an image of a country that is not entirely arbitration prone. Although the modern normative framework has been (part-

ammendment of the Rules on the costs of the proceedings in front of the Permanent Court of Arbitration attached to the Economic Chamber of North Macedonia N0. 02-585/4 from 11 April 2017.

340 Ibid., Artide 9 & 10.

341 Ibid., Artide 13.

342 Artides 7 & 11 of the Rules on the costs of the proceedings in front of the Permanent Court of Arbitration attached to the Economic Chamber of North Macedonia, as adopted on 2 February 2022 by the board of directors of the Economic Chamber of North Macedonia.

343 Ibid., Artide 8.

344 General information about the duration of the arbitration proceedings, available at: https://arbitraza.mchamber.mk/index.aspx?lng=1#page-4 (18/04/2023).

345 Artide 441(1) of the CPA.

ly) established over a decade ago, arbitration in North Macedonia is still in its infancy: arbitration is neither well-known nor well-exploited. At least so far, the Macedonian society has shown no inclination towards the ADR methods of resolving disputes in general, given that the tradition to litigate is still dominant. Notwithstanding the efforts that have been undertaken in recent years to promote arbitration in North Macedonia, much still needs to be done to develop an arbitration culture among businesses.

There has been a slow but positive shift in the attitude of the national courts towards commercial arbitration. From the available cases published on the Judicial Portal of the Republic of North Macedonia, all cases where questions related to arbitration were raised (albeit primarily related to parties invoking arbitration agreements to contest the jurisdiction of national courts), date from the past decade, the vast majority being from 2017 onwards. This shows that arbitration is slowly gaining more prominence within the business community of the country, but it also shows that judges are becoming more aware and familiar with arbitration by the mere fact that they need to deal with issues related to commercial arbitration on a more regular basis.

b) Arbitration Agreements

Concerning arbitration agreements, the LICA, contains the following definition: *"Arbitration agreement" is an agreement by the parties to submit to arbitration all or certain disputes which have arisen, or which may arise between them in respect of a defined legal relationship, whether contractual or not.*[346] Consequently, an arbitration agreement can cover already existing disputes or potential future disputes which may arise between the parties. The LICA also provides that the arbitration can be in a form of an arbitration clause within a contract, or a form of a separate agreement.[347]

According to the LICA, arbitration clauses are also considered separate contracts independent from the main contracts.[348] Consequently, a decision by the arbitral tribunal that the contract is null, and void would not entail *ipso jure* the invalidity of the arbitration clause.

In relation to formalities, the LICA requires that an arbitration agreement must be in writing.[349] As already noted, the LICA was adopted prior to the amendments of the UCITRAL Model Law, and consequently prior to the revision of Article 7, which now contains two options – the first

346 Artide 2(1)(6) of the LICA.
347 Ibid.
348 Artide 16(1) of the LICA.
349 Artide 7(1) of the LICA.

option which requires that an arbitration agreement is in writing, and the second option which accepts arbitration agreements free of any form, or formal requirement. However, the writing requirement is set in a flexible manner. The arbitration agreement will be considered in writing if it is contained in a document signed by the parties, but also if it is contained in the exchange of letters, telex, telegrams, or other means of telecommunication.[350] The arbitration agreement would be considered validly concluded in writing as long as there is a record about the agreement.

The national legislation contains no detailed provisions relating to the law applicable to the arbitration agreement. The LICA contains no explicit reference to the choice of the law for the arbitration agreement. Consequently, the party's choice of law is the primary method for the determination of the law applicable to the arbitration agreement. However, in absence of an explicit choice of law, the question which arises is whether the *lex arbitri* or the law applicable to the merits of the case is to be considered as the implicit choice of the parties. While there are valid arguments for and against either of these approaches, there is no position concerning this choice in the arbitration practice in North Macedonia so far.

While international arbitration practice is still in an early phase, in principle, national courts have a supporting role and positive attitude toward the enforcement of arbitration agreements. From the available cases published on the Judicial Portal of the Republic of North Macedonia, there are several cases where an objection to the court jurisdiction has been raised due to the existence of an arbitration agreement. In the majority of cases with an international element, the courts have accepted the objection of the parties, rejected their jurisdiction, and referred the parties to the arbitration.[351]

However, there are also cases where the national courts have denied the jurisdiction of arbitral tribunals.[352] Still, in all these cases where the national courts found that the tribunals are lacking jurisdiction, it was not because there was some sort of pathology with the arbitration agreement, but rather because they considered that either the parties had failed to raise a timely objection to

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350 Ibid.

351 For example, Decision of the Basic Civil Court in Skopje, Case Number 61ТС-1/18, from 25/09/2018; Decision of the Basic Court Veles, Case Number ТС.бр.108/11, from 08/06/2011; Decision of Appellate Court in Skopje, Case Number ТСЖ-1217/17, from 22/03/2018; Decision of Appellate Court in Skopje, Case Number ТСЖ.бр.2526/10, from 30/06/2011; Decision of Appellate Court in Skopje, Case Number ТСЖ.бр.-1030/13, from 16/09/2013; and Decision of Appellate Court in Shtip, Case Number ТСЖ-91/13, from 19/02/2013.

352 For example, Decision of the Supreme Court, Case Number Рев1.бр. 781/2010, from 26/05/2011; Decision of Appellate Court in Skopje, Case Number ТСЖ-982/16, from 14/10/2016; and Decision of Appellate Court in Skopje, Case Number ГЖ-6223/17 from 01/03/2018.

the jurisdiction of an arbitral institution, thereby accepting the court jurisdiction, or the parties have concluded an optional arbitration agreement, giving them discretionary right to choose between arbitration or litigation.

Finally, there are no specific rules within the national jurisdiction that regulate the extension of an arbitration agreement to non-signatories. There is no arbitration practice in relation to this issue as well. However, there are two cases where the Appellate Court in Skopje has analyzed the scope of arbitration agreements in relation to non-signatories and found that in principle arbitration clauses do not extend to non-signatories.[353]

c) Constitution, Powers, and Challenges of the Arbitral Tribunal

When it comes to the composition of the arbitral tribunal, there are no limits to the parties' autonomy to select arbitrators when the seat of the arbitration proceedings is in North Macedonia. The extent of the autonomy of the parties to select arbitrators is, however, dependent on whether the dispute should be resolved by a sole arbitrator, or by an arbitral tribunal comprised of three or more arbitrators. The LICA allows the parties to select the number of arbitrators,[354] and also to agree on the methods for the composition of the arbitral tribunal.[355] This means that the parties can agree on methods for direct appointment of the arbitrators, or they can agree on an appointing authority.

There are also no limits to the nationality of arbitrators, and parties are free to appoint non-nationals as arbitrators. The LICA contains no information or requirement related to the nationality of arbitrators in international commercial arbitration, and consequently, the parties are free to appoint arbitrators which they deem fit, irrespective of their nationality. However, since in domestic arbitration the parties cannot choose the applicable law, it makes little sense to select an arbitrator which has no knowledge of Macedonian law and is not familiar with the Macedonian legal system.

The LICA also contains guidance in situations where the parties have chosen a method for the selection of arbitrators, but this method fails. The LICA identifies three possible situations of failure:

- One of the parties fails to act as required under the agreed procedure (e.g., the party fails to

[353] Decision of Appellate Court in Skopje, Case Number ТСЖ-2477/14, from 27/10/2014 and Decision of Appellate Court in Skopje, Case Number ГЖ-3267/16, from 04/10/2017.
[354] Article 10 of the LICA.
[355] Article 11(1) of the LICA.

appoint an arbitrator);

- The parties, or two arbitrators, are unable to reach an agreement expected of them under such procedure, (e.g., the parties fail to appoint a sole arbitrator, or the arbitrators fail to appoint the third arbitrator of the tribunal);
- A third party, including an institution, fails to perform any function entrusted to it under such procedure.[356]

In case of any of these types of failures, any party may request the Basic Civil Court in Skopje to undertake the necessary measure and provide aid in the constitution of the tribunal.[357]

The LICA recognizes the principle of "competence-competence." Article 16, titled *Competence of arbitral tribunal to rule on its jurisdiction,* explicitly provides that "*the arbitral tribunal may rule on its own jurisdiction, including any objections to the existence or validity of the arbitration agreement".*[358] The parties have the right to raise a plea about the lack of jurisdiction of the tribunal, however, not later than the submission of the statement of defense. Appointment or participation in the appointment of an arbitrator does not preclude the parties from raising objections to the jurisdiction of the tribunal. In relation to a situation where one of the parties deems that the arbitral tribunal is exceeding its scope of authority, a plea should be made as soon as the matter alleged to be beyond the scope of the tribunal's authority is raised during the arbitral proceedings. These deadlines are not preclusive, as the arbitral tribunal has the right to admit later pleas if it considers the delay justified.[359]

While the arbitral tribunal has the competence to decide on its own jurisdiction, the parties may raise objections for lack of jurisdiction in front of state courts as well. The standard of review by national courts in relation to a tribunal's decision on its own jurisdiction is established within Article 8 of the LICA, which is a verbatim adoption of Article 8 of the UNICTRAL Model Law. Consequently, the LICA has adopted the same standard of review of arbitral agreements by courts as the UNCITRAL Model Law – national courts have broader power to review arbitral agreements, and if the question of the validity of the arbitration agreement is raised in front of national courts, judges have powers not only to conduct *prima facie* review of the arbitral agreement but to conduct a more thorough analysis.[360]

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356 Artide 11(4) of the LICA.
357 Ibid.
358 Artide 16(1) of the LICA.
359 Artide 16(2) of the LICA.
360 Zoroska-Kamilovska, pp. 112–113.

Further, according to the LICA, arbitrators can be challenged by the parties due to a lack of impartiality and independence, or due to a lack of qualifications that are agreed upon by the parties.[361] When an arbitrator is approached, they are under an obligation to disclose any "*circumstances likely to give rise to justifiable doubts as to his impartiality or independence*".[362] The arbitrator also has an ongoing duty through the arbitral proceedings to disclose any further circumstances that might raise doubts about their impartiality or independence. The reasons for which an arbitrator is challenged must have become known to the party after the appointment of the arbitrator[363] – if the party was aware of the reasons prior to the appointment and failed to object, it is assumed that the party consented to the appointment. If an arbitrator is challenged, they participate in the decision on the challenge along with the other members of the tribunal. If the challenge in front of the arbitral tribunal is unsuccessful, the challenging party can request from the Basic Civil Court in Skopje to decide on this issue.[364]

Like in many developed legal systems in the world, national judges in the Republic of North Macedonia enjoy immunity from suit.[365] However, there are no similar rules applicable to arbitrators, and consequently, arbitrators are not afforded immunity from suit. Nevertheless, so far there are also no cases where a party has brought such a suit against an arbitrator or an arbitral tribunal in front of the national courts.

d) Determination of the Substantive Law of the Dispute

The rules for the applicable law to the substance of the dispute depend on the character of the arbitration. In internal (domestic) arbitration, the parties cannot choose the applicable law to the substance of the dispute, i.e. Macedonian law would be applicable regardless of whether the parties have made a choice of law or not. In international commercial arbitration, Article 28 of the LICA provides that in the determination of the applicable law, the tribunal should primarily consider whether the parties have made an explicit choice of the law for the substance of the agreement.[366] In case the parties have made a choice of law of any state, the arbitral tribunal should construe this choice as directly referring to the substantive law of that state and not to its conflict of law rules.[367] In absence of an explicit or implicit choice of law, the general rule is that the tri-

361 Artide 12(2) of the LICA.
362 Artide 12(1) of the LICA.
363 Artide 12(3) of the LICA.
364 Artide 13(3) of the LICA.
365 Law on Courts (Official Gazette of RN Macedonia, No. 58/06, 35/08, 150/10, 83/18, 198/18 and 96/19), Artide 65.
366 Artide 28(1) of the LICA.
367 Ibid.

bunal should refer to the conflict of rules in order to determine the applicable law. The LICA adopts the closest connection test in the determination of the applicable law.[368] Finally, arbitrators may also decide *ex aquo et bono*, or as *amiable compositeur,* however, only if the parties have expressly authorized the tribunal to do so.[369]

e) Confidentiality and Taking of Evidence

The confidential character of arbitration is accepted in the arbitration theory and practice in the Republic of North Macedonia.[370] The LICA[371], as well as the 2021 Skopje Arbitration Rules 35 of the PCA, stipulate that arbitral proceedings are confidential in absence of an agreement between the parties which provides otherwise.

The national legislation contains little guidance when it comes to evidence taking in arbitration. The LICA regulates rules of evidence concerning the determination of the rules of procedures. Article 19(2) of the LICA contains a very general obligation providing that the power conferred upon the arbitral tribunal also includes the power to determine the admissibility, relevance, materiality, and weight of any evidence.[372] However, there are no explicit provisions related to the tribunal's right to order disclosure of documents/discovery, neither upon request of the parties nor on its own motion. The LICA also contains provisions related to court assistance in taking evidence. According to Article 27 of the LICA, the arbitral tribunal, or a party with the approval of the arbitral tribunal, may request from a competent state court assistance in taking evidence. The court will decide on the request in line with its competencies. The procedure for taking evidence is governed by the provisions of the Civil Procedure Act for the procedure of taking evidence before a judge commissioned by a letter of rogatory.

The 2021 Skopje Arbitration Rules contain more elaborate rules on the taking of evidence within the arbitration proceedings.[373] The IBA Rules on the Taking of Evidence in International Arbitration which is a significant instrument designed to aid the tribunal and the parties to the proceedings in the taking of evidence are rarely used in proceedings in North Macedonia. So far, they have been used only once, in a pending case in front of the PCA.

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368 Artide 28(2) of the LICA.
369 Artide 28(3) of the LICA.
370 Zoroska-Kamilovska/Shterjova, pp. 14–15.
371 Artide 24(4) of the LICA.
372 Artide 19(2) of the LICA.
373 Artide 41 of the 2021 Skopje Arbitration Rules.

The dominant method for witness testimony is oral testimony. The COVID-19 pandemic has had a major impact on the way hearings are conducted in international arbitration in general. The pandemic also affected how hearings are conducted in North Macedonia. During the pandemic, there were two cases in front of the PCA where virtual hearings were held.

f) Arbitrability

In relation to arbitrability, the LICA stipulates that international commercial arbitration resolves disputes over rights that the parties freely dispose of and disputes which are not in the exclusive jurisdiction of a court in the Republic of North Macedonia.[374] According to the Macedonian legal order the following disputes are considered non-arbitrable:

- disputes regarding establishment, termination, and status changes of legal entities;[375]
- disputes regarding validity of the entry in public registers established in the Republic of North Macedonia;[376]
- disputes regarding registration and validity of industrial property rights, if the application was submitted in the Republic of North Macedonia;[377]
- disputes regarding ownership and other real estate rights, disputes over the disturbance of possession of a real estate, disputes arising from lease or rent of real estate, or contracts for the use of an apartment or business premises, if the real estate is located on the territory of the Republic of North Macedonia;[378] and
- disputes regarding ownership and other rights on ships and aircrafts, as well as disputes from a lease for an aircraft and ship or disputes over the disturbance of possession of an aircraft and ship if on the territory of the Republic of North Macedonian the register is established in which the aircraft or the ship is registered or if the disturbance of possession occurred on the territory of the Republic of North Macedonia.[379]

374 Artide 1(2) and (6) of the LICA.
375 Artide 129 of the Private International Law Act (Official Gazette of RN Macedonia, No.32/20), hereafter PILA; Artide 49, and 50 of CPA.
376 Artide 130 of the PILA.
377 Artide 144 of the PILA.
378 Artide 141 of the PILA and Artide 49 of the CPA.
379 Artide 143 of the PILA and Artide 50 of the CPA.

g) Mandatory Rules

In relation to mandatory rules related to the arbitral proceedings, the most significant rule is the right to equal treatment of the parties embedded in Article 18 of the LICA. This article is a verbatim adoption of Article 18 of the UNCITRAL Model Law, which contains two requirements – *firstly,* that parties to the proceedings are treated equally by the arbitral tribunal,[380] and *secondly* each party is given full opportunity to present their case and to respond to statements and claims of their adversary.[381] The grounds for challenge of the arbitral award, as well as the grounds for recognition and enforcement of foreign arbitral awards, are also mandatory rules from which the parties cannot derogate. The mandatory rules of substantive nature are diverse and more dispersed throughout various statutes and laws. They aim to protect social, political, and economic values which are the foundations of the country's social order. When the legal, political, and economic system of the Republic of North Macedonia is analyzed through various laws and regulations, it can be concluded that rules which are accepted as parts of the public policy in most developed countries throughout the world (and which form part of the so-called "transnational public policy") are also accepted in the Republic of North Macedonia. Among others, these rules include the protection of human rights (opposition to racial, religious, and sexual discrimination), environment, free-market competition, trading securities, prohibition of corruption, piracy, fraud, bribery, duress, and coercion.

h) Interim Relief

In relation to interim relief, the LICA provides that unless the parties have agreed otherwise, the arbitral tribunal may, at the request of one party, order any party to take an interim measure of protection, which the arbitral tribunal considers necessary in respect of the subject-matter of the dispute.[382] As already elaborated, the LICA was modeled after the UNCITRAL Model Law, but it was adopted before the 2006 amendments, and consequently, it did not incorporate the novelties established therein, including the more thorough and in-depth rules related to interim measures. Consequently, the LICA does not contain more precise rules concerning the conditions for granting interim measures, the types of interim measures, preliminary orders, modification, suspension or termination of the interim measures and preliminary orders, disclosure, costs, and damages, as well as the recognition and enforcement of interim measures. Given the fact that the current leg-

[380] Artide 18(1) of the LICA.
[381] Artide 18(2) of the LICA
[382] Artide 17(1) of the LICA.

islation lacks more precise provisions related to interim measures, the amendments of the UNCITRAL Model Law from 2006 must be implemented within the near future.

Aside from arbitral tribunals, national courts are also entitled to grant interim relief in proceedings subject to arbitration. If the arbitral tribunal's order for an interim measure is not undertaken by the parties voluntarily, the party which has made the motion for interim relief has the right to approach national competent courts to enforce such measure. Additionally, the LICA stipulates that it is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of protection and for a court to grant such measure.[383] In case of concurrent jurisdiction of the court and arbitral tribunal in relation to interim measures, it is up to the party to choose from which body it will seek interim relief.[384]

i) Challenges of the Arbitral Award

In relation to the challenge of an arbitral award, the LICA adopts the same grounds for annulment of an award which are listed in the UNICTRAL Model Law. The grounds for setting aside an arbitral award can be divided into 2 groups:

- The first group comprises grounds whose existence must be proven by the party challenging the award – incapacity of either of the parties to concluding an arbitration agreement, invalidity of the arbitration agreement, lack of proper notice of the appointment of an arbitrator, or of the commencement of the arbitral proceedings or inability to present the case; the arbitral tribunal exceeding its powers arising out of the arbitral agreement (*ultra petum)*; or composition of the tribunal which is not in accordance with the party's agreement.[385]
- The second group comprises grounds that the court examines *ex officio* – violation of public policy and non-arbitrability.[386]

j) Recognition and Enforcement of Arbitration Awards

The recognition and enforcement of arbitral awards is regulated in the LICA. The LICA regulates the issue of recognition and enforcement of foreign arbitral awards in only one article stipulating that the recognition and enforcement of foreign arbitral awards shall be carried out according to

383 Artide 9 of the LICA.
384 Zoroska-Kamilovska, p. 207.
385 Artide 35(2)(a) of the LICA.
386 Artide 35(2)(b) of the LICA.

the provisions of the Convention signed in New York on 10 June 1958 on the recognition and enforcement of foreign arbitral awards (hereinafter New York Convention).[387] The Republic of North Macedonia is a contracting state of the New York Convention.[388]

Concerning the matter of enforcement and recognition of foreign arbitral awards, the LICA only explicitly regulates the issue concerning the notion and classification of foreign arbitral awards,[389] whereas the procedure for recognition and enforcement of a foreign arbitral award is contained in the PILA. According to article 174 of the PILA, the rules regulating the recognition of foreign judgments will also apply to the recognition and enforcement of foreign arbitral awards.[390]

Since the LICA refers to the New York Convention on the matter of recognition and enforcement of foreign arbitral awards, the grounds for refusal of recognition and enforcement of foreign arbitral awards in North Macedonia are those set in Article V of the New York Convention.[391]

Aside from the New York Convention, the Republic of North Macedonia is a party to several bilateral treaties which contain provisions related to the recognition and enforcement of arbitral awards. However, it is worth noting that neither of these treaties is concluded directly by North Macedonia. All these treaties are concluded by the former Yugoslavia and have been accepted by North Macedonia through succession. The bilateral treaties which contain provisions related to recognition and enforcement of arbitral awards are:

- The Agreement between the Federal People's Republic of Yugoslavia and the Republic of Austria on Mutual Recognition and Enforcement of the Decisions of the Selected Courts and the Settlements Concluded before the Selected Courts in Commercial Matters, concluded in Belgrade on March 18, 1960;

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387 Artide 37(3) of the LICA.

388 In fact, the New York Convention is ratified by the former SFRY (Official Gazette of SFRY, International Agreements, No. 11/81). After its dissolution, upon succession, the New York Convention binds the Republic of North Macedonia as well. The former SFRY had acceded to the Convention on 26 February 1982 with the following reservation: "1. The Convention is applied in regard to the Socialist Federal Republic of Yugoslavia only to those arbitral awards which were adopted after the coming of the Convention into effect"; "2. The Socialist Federal Republic of Yugoslavia will apply the Convention on a reciprocal basis only to those arbitral awards which were adopted on the territory of the other State Party to the Convention."; "3. The Socialist Federal Republic of Yugoslavia will apply the Convention [only] with respect to the disputes arising from the legal relations, contractual and non-contractual, which, according to its national legislation are considered as economic", available at: http://www.newyorkconvention.org/list+of+contracting+states (18/04/2023). The Republic of Macedonia notified the succession to the Convention on 10 March 1994.

389 Artide 37(1) and Artide 37(2) of the LICA.

390 Artide 174 of the PILA.

391 For further details regarding the grounds for refusal of recognition and enforcement of arbitral awards see artide V of the New York Convention, available at: http://www.newyorkconvention.org/11165/web/files/original/1/5/15432.pdf (18/04/2023).

- Agreement between the Federal People's Republic of Yugoslavia and the Kingdom of Greece on Mutual Recognition and Enforcement of Judgments concluded in Athens on 18 June 1959;
- Convention on Trade and Navigation between the Federal People's Republic of Yugoslavia and the Italian Republic concluded in Rome on 31 March 1955;
- The Agreement between the Federal People's Republic of Yugoslavia and the People's Republic of Poland on Traffic in Civil and Criminal Matters concluded in Warsaw on 6 February 1963;
- The Agreement between the Socialist Federal Republic of Yugoslavia and the Czechoslovak Socialist Republic on the Regulation of Legal Relations in Civil, Family, and Criminal Matters, concluded in Belgrade on January 20, 1964;
- Agreement between the Socialist Federal Republic of Yugoslavia and the People's Republic of Hungary on mutual traffic concluded in Belgrade on March 7, 1968;[392]
- The Agreement on Mutual Legal Assistance in Civil Matters between the Government of the Republic of North Macedonia and the Government of the Republic of Kosovo, concluded in Skopje, on December 9, 2021.

k) Party Representation and Legal Fees

Concerning the parties' representation in arbitral proceedings seated in North Macedonia, the national legislation contains no limitations or restrictions. However, given the fact that in domestic (internal) arbitration the parties cannot choose the applicable law, and that Macedonian law must apply, it would be more natural and logical for the parties to choose counsels admitted to the Bar Association of North Macedonia, rather than choosing lawyers from other jurisdictions.

Concerning the allocation of costs for the arbitration proceedings, in absence of any agreement between the parties, the "loser pays" principle applies. Both the LICA[393] and the 2021 Skopje Arbitration Rules[394] contain a similar provision. The arbitral tribunal can decide on the costs of the proceedings according to its free evaluation, considering all circumstances of the case, especially the outcome and the success of the proceedings. The costs of the procedure will be borne

[392] All bilateral treaties are cited in Deskoski Toni, International Arbitration Law (Меѓународно арбитражно право), Faculty of Law "Iustinianus Primus" – Skopje, 2016, pp. 85–86; some of the treaties are available at: https://www.pravda.gov.mk/mpd-bilaterala5 (18/04/2023); additionally, registries of bilateral and multilateral treaties are available at: https://www.pravda.gov.mk/mpp-instrumenti (18/04/2023).

[393] Article 34 of the LICA.

[394] Article 60 of the 2021 Skopje Arbitration Rules.

by the party who lost the dispute, and in case the claim is partially accepted, the costs will be borne by both parties, proportionally to the acceptance of the claims.

Under the law of North Macedonia, contingency fees are prohibited. The Law on Obligations provides that while a contingent right may be subject to a contract for sale,[395] a contract by which an attorney or any third party as a recipient, would buy a disputed (contingent) right entrusted to him, or would agree to participate in the distribution of the amount awarded to his principal, is null and void.[396] Based on this provision, the Supreme Court of North Macedonia, adopted a legal opinion that "the contract legal fees concluded between the attorney and the client, in the part where the amount of the remuneration is determined as a percentage which will be calculated after the judgment becomes final and binding, and on the basis of the court's decision on the amount of remuneration to the client, is null and void."[397]

Further, the national legislation does not regulate third-party funding, and consequently, it does not contain any prohibitions, restrictions, or limitations on this matter. At the same time, third-party funding has not gained prominence in the arbitration or judicial practice in North Macedonia, and consequently, there are not any known active funders on the market.

3. Investment Arbitration

(a) General Background of Investment Arbitration in the Republic of North Macedonia

In the Republic of North Macedonia, investment arbitration is regulated by laws, bilateral and regional investment treaties concluded by the country, as well as relevant multilateral conventions.

With respect to domestic regulations, the following laws are most relevant:

- The Law on International Commercial Arbitration of the Republic of Macedonia (hereinafter LICA);[398] and
- The Private International Law Act (hereinafter PILA).[399]

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395 Artide 449(1) of the Law on Obligations (Official Gazette of RN Macedonia, No. 18/2001, 78/2001, 04/2002, 59/2002, 05/2003, 84/2008, 81/2009, 161/2009, 23/13 and 123/13).

396 Artide 449(2) of the Law on Obligations.

397 Legal opinion of the Supreme Court of Republic of North Macedonia, adopted on general session on 1 March 2012.

398 Law on International Commercial Arbitration of the Republic of Macedonia (Official Gazette of Republic of Macedonia, No. 39/2006).

399 Private International Law Act (Official Gazette of RN Macedonia, No.32/2020, 110/08, 83/09, 116/10 and 124/15).

The PILA applies to investment arbitration with respect to the procedure for recognition and enforcement of investment awards in the Republic of North Macedonia. The LICA defines foreign arbitral awards, which applies to investment awards.

The Republic of North Macedonia has concluded a total of 43 bilateral investment treaties (hereinafter BITs), of which 39 currently in force:

Treaty	**Year signed**	Validity status
Croatia - Macedonia BIT	1994	In force since 4 November 1995
Macedonia - Turkey BIT	1995	In force since 27 October 1997
Macedonia - Slovenia BIT	1996	In force since 21 September 1999
Macedonia - Serbia BIT	1996	In force since 22 July 1997
Germany - Macedonia BIT	1996	In force since 17 September 2000
Macedonia - Switzerland BIT	1996	In force since 6 May 1997
Macedonia - Poland BIT	1996	In force since 22 April 1997
Italy - Macedonia BIT	1997	Expired on 28 May 2019
China - Macedonia BIT	1997	In force since 1 November 1997
Macedonia - Russian Federation BIT	1997	In force since 9 July 1998
Macedonia - Malaysia BIT	1997	In force since 17 March 1999
Albania - Macedonia BIT	1997	In force since 3 April 1998
North Korea - Macedonia BIT	1997	In force since 30 April 1998
France - Macedonia BIT .	1998	In force since 31 March 2000
Macedonia - Ukraine BIT	1998	In force since 25 March 2000
Macedonia - Sweden BIT	1998	In force since 1 October 1998
Macedonia - Netherlands BIT	1998	In force since 1 June 1999
BLEU (Belgium-Luxembourg Economic Union) - Macedonia BIT	1999	In force since 4 November 2002
Bulgaria - Macedonia BIT	1999	In force since 5 June 1999
Macedonia - Taiwan Province of China	1999	In force since 9 June 1999

BIT		
Egypt - Macedonia BIT	1999	Not entered into force
Macedonia - Romania BIT	2000	In force since 13 February 2002
Iran - Macedonia BIT	2000	In force since 10 July 2013
Finland - Macedonia BIT	2001	In force since 22 March 2002
Bosnia and Herzegovina - Macedonia BIT	2001	In force since 26 April 2004
Austria - Macedonia BIT	2001	In force since 14 April 2002
Hungary - Macedonia BIT	2001	In force since 14 March 2002
Belarus - Macedonia BIT	2001	In force since 22 November 2002
Czech Republic - Macedonia BIT	2001	In force since 20 September 2002
Macedonia - Spain BIT	2005	In force since 30 January 2007
India - Macedonia BIT	2008	Unilaterally denounced. Terminated as of 31 July 2019
Kuwait - Macedonia BIT	2008	In force since 02 November 2011
Macedonia - Slovakia BIT	2009	In force since 25 August 2011
Macedonia - Morocco BIT	2010	In force since 15 October 2012
Macedonia - Montenegro BIT	2010	In force since 30 September 2011
Lithuania - Macedonia BIT	2011	In force since 13 January 2012
Macedonia - Qatar BIT	2011	Not entered into force
Kazakhstan - Macedonia BIT	2012	In force since 21 May 2016
Azerbaijan - Macedonia BIT	2013	In force since 12 August 2013
Macedonia - Viet Nam BIT.	2014	In force since 11 January 2016
Denmark - Macedonia BIT (2015).	2015	In force since 30 June 2016
Kosovo – Macedonia BIT	2015	Both states have ratified the BIT as of 7 December 2015.
North Macedonia - United Arab Emirates BIT	2021	Not entered into force

The country is also party to important regional investment treaties, such as the Energy Charter Treaty. The Republic of North Macedonia is party to the ICSID Convention, as well as to the New York Convention.

The country uses a model BIT determined in 2009, but is currently preparing a new model BIT.

With respect to investment arbitration practice, as of today, there is publicly available information regarding nine investment arbitration cases brought against North Macedonia, most of them initiated in recent years and several still ongoing.

Case	Year	Arbitration rules	Outcome	Breaches found
Swisslion v. Macedonia	2009	ICSID	Decided in favour of investor	Fair and equitable treatment/Minimum standard of treatment, including denial of justice claims
EVN v. Macedonia	2009	ICSID	Settled	n/a – settled before decision
Guardian Fiduciary v. Macedonia	2012	ICSID	Decided in favour of State	None - declined justriction
Tasev v. Macedonia	2017	UNCITRAL	Pending	n/a
Cunico v. Macedonia	2017	ICSID	Discontinued	None – discontinued before decision
Binani v. Macedonia (I)	2017	UNCITRAL	Discontinued	None – discontinued before decision
Skubenko and others v. North Macedonia	2019	ICSID	Pending	n/a
Binani v. North Macedonia (II)	2020	UNCITRAL	Pending	n/a
GAMA Güç Sistemleri Mühendislik ve Taahhüt A.Ş. v. North Macedonia	2021	ICC	Pending	n/a

As can be deduced from the table above, ICSID arbitration is most commonly commenced against the country. Most of these cases involve the mining sector.

No investor from North Macedonia has ever initiated investment arbitration.

The Government of North Macedonia generally has a positive attitude towards investment treaty arbitration, evidenced by public statements from officials, the preparation of a new model BIT and the recently concluded BIT with a capital exporting country such as the United Arab Emirates.

(b) Investors and Investment in BITs

"Investors" under BITs concluded by North Macedonia are usually considered:

- natural persons who are citizens of the contracting party not host to the investment; and
- legal persons including, enterprises, companies, corporations, business associations and or organizations established or organized in accordance with the respective state legislation of either contracting party having their seat and their main activities in the territory of that contracting party;

The definition of "investment" in BITs concluded by North Macedonia generally has a very wide scope. "Investment" is usually defined as "any kind of asset", followed by a non-exhaustive illustrative list of types of investments protected under the BIT, which are also of general nature. Among others, the types of investment usually explicitly mentioned as protected in BITs are:

- property, guarantee and property rights;
- shares, stocks and other debentures in companies;
- monetary claims relating to investments;
- intellectual and industrial property rights; and
- rights of financial nature granted by law or agreement.

An important feature of the definitions of investment is the requirement of legality. In order for an investment to be protected under the BIT, the asset should be invested "*in accordance with the laws and regulations of the Contracting Party in whose territory the investment is made*". This clause also determined that the investment protected under BITs concluded by North Macedonia must have a territorial connection to the host state.

(c) Handling of Investment Arbitration Cases

Notices of dispute against North Macedonia are sent to the Government directly. It is the Government that handles investment arbitration cases, along with its appointed legal counsel.

On 19 December 2017, the Government founded the Coordination Body for Monitoring Arbitration Proceedings Arising from International Treaties.[400] This Coordination Body is responsible for monitoring, on behalf of the Government, all arbitration proceedings where North Macedonia appears as respondent. It is comprised of state officials and experts and presided by the Deputy President of the Government in charge of Economic Affairs. The Coordination Body is especially tasked with briefing the Government of all matters of relevance regarding the arbitration proceedings, communicating with the legal representatives of the state and coordinating the communication between the state authorities and the legal representatives.

Foreign international law firms, with experience and expertise in international arbitration, usually act as counsel to North Macedonia in investment arbitration cases. These foreign counsels usually engage a local law firm for assistance with domestic law matters, obtaining evidence and required documents, communication with state authorities, witnesses etc.

There is no formal procurement process when engaging foreign counsels. Under Article 23 of Law on Public Procurement,[401] the procurement process of legal representation for international and foreign arbitration, court and conciliation proceedings is exempted from the rules applicable to public procurement procedures. According to publicly available information from Government sessions, the usual procedure is that the Government sends a direct request for a bid to several international law firms and chooses the firm whose offer it deems most acceptable.

With respect to voluntary compliance with adverse investment arbitration awards, it should be noted that there are no public records of any enforcement proceedings initiated against North Macedonia for (non-)compliance with an arbitration award. In relation to adverse ICSID awards, North Macedonia has not sought annulment proceedings to date.

(d) Recognition and Enforcement of Investment Awards

In line with Article 174 of the PILA, the provisions regulating the procedure for recognition of foreign judgments also apply to foreign arbitral awards. An investment award shall be regarded as a foreign arbitral award because, in accordance with the LICA, any arbitral award that is not

[400] Government Decision no. 44-8454/1 dated 19 December 2017.
[401] Official Gazette of RN Macedonia nos. 24/19 and 87/21.

adopted in the Republic of North Macedonia shall be considered as a foreign arbitral award. Therefore, the procedure for recognition of foreign judgments, prescribed in Articles 165 to 171 of the PILA, also applies to investment awards. Once recognized, investment awards are enforced in line with general rules on enforcement,[402] in particular in line with the Law on Enforcement.[403]

The rules on recognition and enforcement of arbitral awards found in the New York Convention are applicable to non-ICISD arbitral awards. With respect to ICSID awards, it should be noted that Article 54 Paragraph 1 of the ICSID Convention provides that "*each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State.*" In accordance with Article 54 paragraph 2 of ICSID, "*a party seeking recognition or enforcement in the territories of a contracting state shall furnish to a competent court or other authority which such state shall have designated for this purpose a copy of the award certified by the Secretary-General.*" Paragraph 3 of the same Article provides that the execution of the award shall be governed by the laws concerning the execution of judgments in force in the State in whose territories such execution is sought.

Under Article 54 of the ICSID Convention, each state shall designate the competent court for recognition and enforcement of ICSID awards. North Macedonia has not designated a competent court for this purpose.[404] With regards to domestic legislation on the competence of courts for recognition and enforcement of investment awards, it should be noted that in accordance with Articles 166 (2) and 174 of the PILA, any Macedonian court, including the Basic Civil Court in Skopje, is locally and materially competent and would have jurisdiction in a procedure for recognition and enforcement of a foreign arbitral award.

In accordance with Article 8 of the Law on Enforcement, enforcement of decisions of a foreign court may be performed if the decision fulfils the conditions of recognition prescribed in law or in treaties ratified in accordance with the constitution. This provision is equally applicable to investment awards. Article 218 of the Law on Enforcement limits the assets in ownership of Republic of North Macedonia and its bodies, units of local self-government and public enterprises over which execution may be performed. Namely, the assets which are necessary for the performance of government and public activities and tasks are exempted from enforcement.

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402 As provided in Artide 173 of the PILA.

403 Official Gazette of the Republic of Macedonia nos. 72/2016, 142/2016 and 233/2018 and Official Gazette of RN Macedonia no. 14/2020.

404 As stated on the ICSID website, available at: https://icsid.worldbank.org/about/member-states/database-of-member-states/member-state-details?state=ST196.

Which assets and rights are necessary for the performance of government and public activities and tasks is determined by the president of the court on whose territory the enforcement action is sought, if during the enforcement proceedings the parties do not agree on that issue or otherwise such determination by the president of the court is required.

4. Mediation

(a) General Background and Mediation Practice in the Republic of North Macedonia

Promotion and encouragement of mediation practice in the Republic of North Macedonia is going slow and with modest results.[405] Mediation in North Macedonia is regulated by the Mediation Act (MA)[406] enacted in December 2021, and in force since January 2022. The latest MA is the third novel law regulating mediation. Namely, mediation was first introduced and promoted[407] in the country as an alternative dispute resolution mechanism by the Mediation Act 2006. Aiming to upgrade and advance the concept of mediation, a new Mediation Act was passed in 2013.[408] However, the concept of mediation as provided in the Mediation Act from 2013 proved faulty in practice.[409] Hence, the novel MA was enacted with the purpose to improve the legal conditions for implementation of the law in practice, to ensure equal application of the provisions by the mediators, and to provide better solutions for promotion of mediation as dispute resolution mechanism and its results.

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405 See more details on the process, *Zoroska-Kamilovska/Rakočević*, pp. 59–77.

406 Published in the Official Gazette of the Republic of North Macedonia no. 294/2021 on 27 December 2021.

407 However, it should be noted that the Law on Trade Companies from 2004 incorporates a provision promoting mediation by enabling shareholders to agree on mediation for resolution of disputes arising from the company act. See Artide 41, paragraph 1 of the Law on Trade Companies (Official Gazette of the Republic of Macedonia no. 28/2004). This provision remains unamended and is still in force.

408 Official Gazette of the Republic of Macedonia no. 188/2013, 148/15, 192/15 and 55/16.

409 In assessing the current state of mediation in North Macedonia, the Ministry of Justice in its Strategy for reform of the Judicial Sector for the period 2017 – 2022 provides the following: „In 2013 a new Law on Mediation was adopted. However, the European Commission Progress Report has made observations for years in view of the dysfunctional concept of mediation. There is still a lack of licenced mediators primarily due to the complex and inadequate exam for mediators. The Mediation Board is also ineffective, and the process of establishing the Chamber of Licenced Mediators was also delayed. The judiciary stimulates the dual concept of mediation (mediation before initiating court proceedings and mediation during the proceedings itself). The Academy for Judges and Public Prosecutors is passive in organising trainings on the topic of ADR, especially concerning mediation and arbitration. The number of reported and registered cases in the Register of Mediation Procedures kept by the Ministry of Justice does not coincide with the number of cases recorded in the individual registries of the mediators. This situation is a result of the inconsistencies in the Law regarding the obligation of the mediators to report the cases to the MoJ and the different interpretations. Mediation attempts, although foreseen as an option in the Law on Justice for Children, are not applied because the Public Prosecutor's Office does not have enough financial resources to comply with the law. Awareness among individuals of the advantages of mediation remains low and efforts should be made to further raise it." Strategy for reform of the judicial sector for the period 2017-2022 with an action plan, Ministry of Justice, pg. 17, available at: https://www.pravda.gov.mk/Upload/Documents/Strategija%20i%20akciski%20plan_ANG-web.pdf.

The MA is now harmonized with Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters.

In addition to the MA, the Law on Obligations (LO)[410] applies to the conclusion, legal force, and termination of the mediation settlements, as well as in relation to the material liability of the mediator.

Furthermore, the Civil Procedure Act (CPA)[411] for certain types of disputes entails provisions for mandatory attempt for mediation before resorting to litigation, as well as provisions obliging the court to suggest mediation. In this sense, Mandatory attempt for mediation is prescribed for commercial disputes which are to be initiated by lawsuit with claim value up to 1.000.000 denars.[412]

The mandatory attempt for mediation was introduced with the CPA amendments in 2015. The reasons for this legislative approach were barely explained to the public. The absence of showing specific indicators for the need to introduce mandatory attempt of mediation in this type of disputes led to resistance by many commercial subjects, but also by the members of the legal profession. In this sense, number of issues have emerged as problematic: the very concept of compulsory mediation; lack of a sufficient number of qualified mediators to deal with the increasing inflow of cases; introduction of mandatory initial mediation session only in certain type of disputes and up to a certain value; increased costs for the parties if the initial mediation session fails; the violation of the right to access to justice, etc.[413]

Although not related to disputes, provisions for special optional mediation procedures in criminal law matters are incorporated in the Criminal Procedure Act (CrPA)[414] for cases of prosecution by private lawsuit and the Act on Justice for Children (AJC)[415] for cases of crime punishable by imprisonment up to 5 years.

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410 Law on Obligations (Official Gazette of the Republic of Macedonia no. 18/2001, 78/2001, 04/2002, 59/2002, 05/2003, 84/2008, 81/2009, 161/2009, 23/13 and 123/13).

411 Civil Procedure Act (Official Gazette of the Republic of Macedonia no. 79/05, 110/08, 83/09, 116/10 and 124/15). The mandatory attempt for mediation was introduced with its amendments in 2015.

412 See Artide 461 (1) of the CPA.

413 See for more details, *Zoroska-Kamilovska/ Rakočević*, pp. 59–77.

414 Criminal Procedure Act (Official Gazette of the Republic of Macedonia no. 150/10, 100/12, 142/16 and 198/18).

415 Act on Justice of Children (Official Gazette of the Republic of Macedonia no. 148/13 and Official Gazette of the Republic of North Macedonia no. 152/19 and 275/19).

Regarding the actual practice of mediation in the country, according to data obtained from the Ministry of Justice for the purposes of this report,[416] in the period of 2016 – 2021, the case count and outcome of conducted mediation procedures is as follows:

Year	**Case Count**	**Outcome**	
		settlements reached	**no settlement reached**
2016	217	105	112
2017	1323	1120	203
2018	473	122	351
2019	372	71	301
2020	617	148	469
2021	495	164	331
Total case count 2016-2021:	**3497**	**1730**	**1767**

Considering this data, 2016 marks the year with least mediation procedures, while 2017 marks the year with most mediation procedures. The outcome of the mediation procedures, that is, the level of reached settlements in 2016 is 48%, for 2017 it is 85%, for 2018 it is 26%, for 2019 it is 19%, for 2020 it is 24% and for 2021 it is 33%. This data shows that the percentage of reached settlements varies considerably. However, if one looks the outcome of the total number of mediations in the last five years, it is positive that in almost half of the mediations cases a settlement was reached.

It should be noted that different data on the country's mediation case count is being presented by the Chamber of Mediators. The number of reported and registered cases in the Registry of

[416] This is data obtained from the Ministry of Justice for the purposes of this report. The document from the Ministry states that this data is based upon the the data provided by 32 mediators (14 mediators have not entered any data) in the e-registry (which was formed in 2020). Hence, it is data obtained by the mediators during and after 2020. Different data which referenced the Ministry of Justice as a source is presented in 'Mediation – Current state of use in the Republic of North Macedonia', Shabani F., published in the Vadyba Journal of Management 2021, No.1 (37), available at: https://www.ltvk.lt/file/zurnalai/06_Shabani.pdf).

Mediation Procedures of the Ministry of Justice does not coincide with the number of cases recorded in the individual registries of the mediators.[417]

Hence, at the moment there is strong inconsistency in the statistical data of the mediation practice in the country. To overcome such inconsistency and keep relevant track of the mediation practice, an e-Registry of Requests for Mediation was formed in 2020.

The novel MA explicitly provides for an obligation of the mediators to report the request for mediation in the e-Registry within three days after receipt of such request, as well as to report each conduct of the mediation procedure until the final completion of the procedure.[418]

The Government of North Macedonia strongly supports the promotion of mediation as a viable alternative to taking cases in front of national courts. In this regard, on its 142th session dated 4 July 2019[419], the Government adopted a conclusion by which it recommends the state bodies, other state institutions and local authorities to choose mediation as an option for dispute settlement aiming at faster solution and prevention of additional costs when dealing with issues arising from their working activities.

National judiciary is also strongly encouraged to promote mediation as a viable dispute resolution mechanism, and it is even obliged by law to suggest mediation to the parties for certain types of disputes. In this sense, a duty of the civil court to instruct the parties of the possibility to mediate is incorporated in Article 272, paragraph 2 of the CPA where it is explicitly provided that "*[i]n cases for which mediation is allowed, the court is obliged to deliver the parties an indication in writing that the dispute may be resolved by mediation along with the invitation for the pre-trial hearing*". For disputes in which pre-trial is not held, and which may be subjected to mediation, the court is obliged to indicate the possibility of initiating mediation, in writing, along with the invitation for the main hearing.[420]

In addition to this, an obligation for the judiciary and other actors from the justice system to indicate the possibility of resolving a dispute through mediation is incorporated in Article 36 of the MA which provides that "*[t]he court, the notary public as his trustee, lawyer and/or state administration body are obliged to point out to the parties of the possibility to mediate and to provide them with the necessary information about the mediation procedure*".

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[417] Strategy for reform of the judicial sector for the period 2017-2022 with an action plan, Ministry of Justice, p. 17, available at: https://www.pravda.gov.mk/Upload/Documents/Strategija%20i%20akciski%20plan_ANG-web.pdf (18/04/2023).

[418] See Artide 16, paragraph 3 of the MA.

[419] Report from the 142th Government Session dated 4 July 2019 is available at: https://vlada.mk/node/18457.

[420] See Artide 436(3) of the CPA.

A 2021 study report[421] aimed at assessing the view and perception for mediation of the employees in the private sector and public administration in North Macedonia shows that there is lack of information regarding mediation. The findings of the study show that mediation is perceived as a viable alternative for dispute settlement by the persons informed of mediation, however, that the persons uninformed of mediation are predominant.

Key findings of an analysis of the mediation practice in North Macedonia[422] show that the level of information of the positive aspects of mediation, both in the justice sector and the private sector is too low.

(b) Mediation-Eligible Disputes

Mediation in North Macedonia is available for disputes in which the parties may freely dispose of their claims unless the law provides for exclusive jurisdiction of a court or other body.[423] According to the MA,[424] the types of disputes which may be subjected to mediation are: property disputes arising from inheritance proceedings; family disputes; labor disputes; commercial disputes; consumer disputes; insurance disputes; disputes arising from procedures for notary payment orders; disputes related to education; disputes related to health and safety at work; disputes related to the protection of the environment; disputes related to discrimination; disputes related to civil liability for insult and defamation; as well as other types of disputes between domestic and foreign natural persons and/or legal entities in which mediation corresponds to the nature of the dispute and may aid in its resolution.

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421 The study was conducted in May – June 2021 by the European Policy Institute (a non-governmental organization established and operating in North Macedonia) in cooperation with Rating Agency (a company conducting market research and assessment of public opinion). The study report is available at https://epi.org.mk/wp-content/uploads/02-Извештај-Медијација-ЕПИ.pdf.

422 "Analysis of the mediation practice in North Macedonia", Skopje 2022, issued by the European Policy Institute (a non-governmental organization established and operating in North Macedonia) which is developed under the project "Mediation, without dilemma!" conducted by the European Policy Institute in cooperation with the Academy of Judges and Prosecutors, the Chamber of Mediators and the Mediation Federation of Nederlands. It should be noted that the observation of the mediation practice was focused on the implementation of the Mediation Law 2013. The publication is available at: https://epi.org.mk/wp-content/uploads/АНАЛИЗА-ЗА-ПРИМЕНА-НА-МЕДИЈАЦИЈАТА.pdf

423 See Artide 1 (1) of the MA.

424 See Artide 1 (2) of the LM.

(c) Mediation Agreements

Article 4 (2) of the MA provides that "*[c]ontractual mediation is mediation between the parties, which arises from their obligation relation in the areas provided in Article 1 of this law, by entering a provision with which the agreement prescribes that in the event of a dispute, the dispute will be resolved in mediation before initiating court procedure or other procedure. In case of an initiated lawsuit to the competent court, without proof by a mediator for confirmation of an attempt to resolve the dispute in mediation, there is a ground for the claim to be dismissed due to lack of court competence*".[425]

In light of the cited provision, a valid mediation agreement requires that the parties must at least make an attempt to resolve their dispute by mediation. In this sense, in case when a party seeks court protection, and has not initiated mediation before resorting the dispute to court, the court may dismiss the claim. Hence, in case of a valid mediation agreement, the party may not directly seek court protection of its claim, regardless of whether it refuses to mediate.

Similarly, in case of a dispute which is subject to mandatory mediation in accordance with the CPA, the claim submitted to court without the attempt to mediate the dispute bears the same legal effect.[426]

(d) Mediators

A mediator is a natural person licensed to undertake mediator work in accordance with the MA, the acts of the Chamber of Mediators and who conducts the mediation procedure in accordance with the principles of mediation.

A prerequisite for obtaining mediator license is passing the mediator exam. The conditions provided by law for taking the mediator exam refer to relevant education,[427] trainings,[428] work

[425] It is debatable whether the legal provision stipulating the ground for dismissal of claim as *'lack of competence of the court'* is appropriate. The court is *in fact* competent to address such issue after the requirement of an attempt of the parties to resort to mediation is met. Hence, a lawsuit filled without the attempt to mediate might be more appropriately considered as incomplete (the absence of proof for mediation attempt) or as not allowed (if deemed as premature), and it might be considered more appropriate for the court to dismiss it on such ground.

[426] See case law: Decision no.TS1-3/20 dated 30 January 2020 issued by the Basic Court Ohrid.

[427] Article 52(1) a) of the MA provides that the person must have high education with category VII/I or 300 credits according to the European Credit Transfer System.

[428] Article 52(1) b) requires that the person must have a certificate for undertaken a basic mediation training conducted in accordance with an accredited program in duration of at 70 hours in the Republic of North Macedonia. In addition to this, Article 52(1) g) requires the person to have followed at least four mediation procedures evidenced in the Registry.

experience,[429] citizenship of the Republic of North Macedonia, and passing relevant psychological and integrity tests.[430]

Mediator license is issued by the National Council on Mediation[431] to the persons who passed a mediator exam and filed an application for mediator license. Licensed mediators are obliged by law to undertake continuous professional improvement and advancement. The manner of complying with this obligation is explicitly provided by the MA.[432]

The current list of licensed mediators[433] includes 46 licensed mediators.

At the moment, there is no domestic entity offering institutional mediation. However, parties are free to choose mediation offered by foreign mediation institutions as a dispute resolution mechanism.

(e) Costs of Mediation

The general rule is that each party bears its own costs in the mediation, whereas the common costs of the mediation are shared equally between the parties.[434] The common costs include the fees and expenses for the mediator. The own costs of the parties are the other costs incurred in the mediation process (for eg., attorney's fees or expenses). The parties are free to agree upon a different model for cost sharing.

In mediation in which there is no active involvement by all parties, the party who initiates the mediation is entitled to pay the mediation fees.[435] If the initiation of the mediation is made in cases of compulsory mediation prescribed by law or of an agreement between the parties, and the mediation attempt fails, the party who initiated the mediation attempt is entitled to seek reimbursement of the mediation costs in the court procedure.[436]

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[429] In accordance with Artide 52 (1), v) at least 3 years of work experience after obtaining the high level of education is required.

[430] The psychology and integrity tests must be conducted by a licensed expert.

[431] The National Council for Mediation is a governmental body for ensuring, monitoring and assessing the quality of mediation work. The formation of the National Council for Mediation is prescribed by the 2021 MA.

[432] See Artide 52 of the MA.

[433] Data from the Registry of licensed mediators (last checked: 1 October 2022). The Registry's list is available at https://www.pravda.gov.mk/mediatori.

[434] Artide 31 (1) of the MA.

[435] Artide 4 (3) of the Tariff for Mediators.

[436] Artide 31 (5) of the MA.

Mediator's fees are provided in the Tariff for Mediators of the Ministry of Justice (Official Gazette of RN Macedonia, no. 194/2022). The fees are determined by the mediator's effort, the complexity of the dispute, the allocated time, and the number of the parties.[437] Besides for fees, the mediator is also entitled to the expenses it incurs during the mediation, for which it has an obligation to keep such costs at the lowest level possible and to conduct the expenses with care.[438]

As part of North Macedonia's strategy for development of mediation, the MA provides for a possibility of state aid for part of the mediation costs if certain conditions are met. Namely, state aid is provided in the following cases[439]: 1) mediation was conducted before the commencement of a court procedure; 2) a special law does not provide for a compulsory mediation attempt; 3) in an already established contractual relation, the parties have not resorted to mediation and have not yet initiated a court procedure; 4) at least one of the parties is a natural person; 5) the mediator registered the case as resolved with mediation settlement in the Registry; 6) the mediator presented an adequate cost sheet, with costs decreased by the amount of the state aid.[440] State aid may be granted in one mediation between the same parties for the same dispute, and up to an amount of 4.000,00 denars.[441]

(d) The Legal Effect of Mediation Settlement Agreements

Mediation settlement agreements are binding to the parties even if not sanctioned by the court.

However, mediation settlement agreements are not an enforceable title, unless their content is solemnized by a notary public or verified/confirmed by the court in a court procedure.

In this regard, mediation settlement agreements may be composed as an enforceable title if the content of the settlement agreement is solemnized by a notary public.[442] With the solemnization of the mediation settlement agreement, the settlement attains the legal validity of an enforceable title, thereby bears the same legal effect as a final and binding court decision.

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437 For eg., the Tariff for Mediators provides the mediator is entitled to fee of 20 euros per hour and 50 euros for the drafting of the settlement. It also provides cases in which such amount is increased, for eg., in case of mediation with multiple parties, the fees are increased by 30% for each additional party, in cases of multiple mediators, the fees are increased by 70% for each comediator.

438 Artide 5 of the Tarrif for Mediators.
439 Artide 35 of the MA.
440 See Artide 35 (1) of the MA.
441 See Artide 35 (2) of the MA.
442 See Artide 28, (1) and (2) of the MA.

Mediation settlement agreements may also obtain the legal validity of a court settlement, that is, an enforceable title, in court proceedings. In this regard, in cases where mediation was successfully conducted upon court reference, the parties are obliged to submit the settlement to the court within 8 days from the date it was concluded. [443] The court schedules a hearing on which the mediation settlement is confirmed in the minutes of the court hearing, by which it asserts the legal validity of a court settlement, that is, if the legal conditions[444] for court settlement are met.

On the other hand, mediation settlement agreements which have no legal validity of an enforcement title, may be enforced in national courts as binding contracts between parties in accordance with LO.

In this regard, Article 113 of the LO provides that when one contracting party fails to perform its obligation, the other party, unless otherwise determined, is entitled to request performance of the obligation under the conditions provided in the LO, or, if termination of the contract does not result by law, to terminate the contract with a simple statement; and in any case it has the right to be compensated.

Hence, if a party refuses to voluntarily comply with the mediation settlement agreement, the other party may seek performance of the mediation settlement agreement in court proceedings.

(e) Challenge of a Mediation Settlement Agreement

There is no special procedure for challenging a mediation settlement agreement. According to Article 29 of the MA, the provisions of the LO govern the conclusion, effect, and termination of the mediation settlement.

A general provision for nullity of contracts is stipulated in Article 95 of the LO, which provides that a contract which is not in accordance with the Constitution, laws and good customs shall be null and void, unless the objective of the violated rule indicates other sanction or if the law provides otherwise for the particular case. Furthermore, Article 95 of the LO entails that if the conclusion of a certain contract is prohibited for only one of the contracting parties, the contract

443 See Artide 308 (4) of the CPA.
444 See Artide 307 and Artide 308 (4) from the CPA.

shall remain valid if the law does not provide otherwise for the particular case, while the party in violation of the legal prohibition shall bear the appropriate consequences.

In accordance with Article 103 of the LO, a contract is voidable when it is concluded by a party with business capacity limitation outside of its capacity, when there are defects in the intention of the parties, or when such legal consequence is provided by law or other act of regulation.

(f) North Macedonia and the Singapore Convention on Mediation

North Macedonia signed the Singapore Convention on Mediation on 7 August 2019. The Convention has not yet been ratified. Up to May 2023, the Singapore Convenition has 56 signatories and 11 parties.[445] There is no available public information regarding the status of the ratification process in North Macedonia.

E. Conclusion

The Republic of North Macedonia is a small, landlocked, and developing country with an open and import-oriented economy. Considering these characteristics, the country is dependent on establishing and maintaining trade relationships with its key strategic partners as well as attracting foreign investments. The country has been in a slow process of transition since declaring its independence in 1991. In the past two decades, the country has also been aspiring to become a member of the European Union. The road toward EU accession has been long and cumbersome, with blockades from neighbouring countries and political turmoil which hindered the reform processes and the country's economic performance. However, despite the various impediments, the country remains determined to continue its path of accession within the EU through the implementation of EU standards.

Alternative dispute resolution methods have been considered a viable alternative to bringing claims in front of state courts for many decades. They have enabled merchants to resolve commercial disputes faster, more flexibly, and confidentially in front of a neutral forum. Even more, ADR methods have found much broader applications over the years and have proved to be an efficient tool for resolving, among others, investment, labour, and consumer disputes. The establishment of effective ADR mechanisms factors towards the creation of a favourable business and

[445] Data from the official website of the United Nations: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXII-4&chapter=22&dang=_en (last access: 30 May 2023)

investment climate are important determinants for economic growth. While in most developed countries ADR methods have been attractive for a long time, in the majority of developing counties and countries with economies in transition, they have not yet reached their full potential. Even though the foundations for alternative dispute-resolution methods have been set through the enactment of several laws, so far in the Republic of North Macedonia, ADR has not gained the recognition and prominence it has on a global scale.

The **judicial system** has been subject to much criticism since the country's independence. While there are continuous efforts for the implementation of reforms it seems that most of them do not achieve the desired results. Lack of judicial independence, corruption, violation of admission procedures to the Academy for Judges and Prosecutors, as well as misuse of the automated court case management information system (ACCMIS) are just some of the problems which have arisen in the past that have led to the low level of trust in the judicial system in the country.

From an organizational point of view within the civil court system, the judicial power is exercised by 26 basic courts, 4 courts of appeal, and the Supreme Court of the Republic of North Macedonia. Judges are appointed by the Judicial Council of the Republic of North Macedonia, which is composed of 15 members, the majority elected by the judges themselves and some appointed by the National Assembly. A necessary precondition for the appointment of a judge is that the person must have completed training in the Academy for Judges and Public Prosecutors.

In relation to civil proceedings, the main rules are contained in the Civil Procedure Act (CPA). In general, civil court proceedings are initiated by filing a lawsuit. When the court receives the lawsuit, it conducts a preliminary assessment, and if the preliminary assessment of the lawsuit is successful, it delivers the lawsuit to the defendant for response and schedules a preliminary hearing. After the preliminary hearing, a main hearing is scheduled. The main hearing is the central stage of litigation. When the main hearing is closed, the last stage of the litigation is rendering a decision by the court. Third-party intervention in civil proceedings is possible, as well as consolidation, discontinuation, and stay of proceedings.

Concerning evidence, each party is obliged to state the facts and propose evidence on which it bases its claim or by which it abnegates the allegations and evidence of the opposing party in the procedure pre-trial hearing at the latest. The following types of evidence are admissible in civil proceedings: inspection, documents, witnesses, expert witnesses, as well as party examination. In principle, courts decide on the merits of the dispute by judgment. All other interlocutory matters and procedural issues are decided by the issuance of court orders and court decisions. When it comes to cost for the proceedings, in general, the CPA adopts the "loser pays" principle, *i.e.* the

party who loses the litigation is obliged to reimburse the costs of the other party, or if a party partly succeeds in the litigation, the court may consider such success and determine that the party reimburses a proportional party of the costs of the other party.

The recognition of foreign judgments is regulated by the Private International Law Act. Recognition is sought in non-contentious proceedings. Enforcement of foreign judgments is regulated in the Law on Enforcement. To this date, the country has concluded 14 bilateral agreements that regulate the enforcement and recognition of foreign judicial awards. In 2005, a private system of enforcement was introduced transferring the powers for enforcement from courts to enforcement agents (bailiffs). While initially, this proved to be very successful, according to a recent report from the Ministry of justice from 2021, the effectiveness of enforcement of debt is gradually decreasing from 63.3% in 2017 to only 41,66% in 2020. The percentage of fully enforced claims, during the 15-year existence of private enforcement agents in Macedonia also amounts only to 36,48%.

In relation to **commercial arbitration**, the country does not follow the contemporary trends in arbitration law regarding the existence of unified rules that would apply both to international and internal (domestic) arbitration. The Law on International Commercial Arbitration of the Republic of Macedonia (LICA) applies to international commercial arbitration and the CPA applies to domestic arbitration. The LICA was enacted in 2006 and is based f the UNCITRAL Model Law on International Commercial Arbitration of 1985. However, the LICA has not yet implemented the amendments of the UNCITRAL Model Law from 2006. Consequently, it only contains an option for a conclusion of an arbitral agreement "in writing" and it does not contain more thorough and in-depth rules related to interim measures.

Concerning the arbitration agreement, it has to be emphasized that the "in writing" requirement is set in a flexible manner. In principle, the arbitration agreement would be considered validly concluded in writing as long as there is a record of the agreement. While international arbitration practice is still in an early phase, in principle, national courts have a supporting role and positive attitude toward the enforcement of arbitration agreements. From the available data, there are several cases where an objection to the court jurisdiction has been raised due to the existence of an arbitration agreement. In the majority of cases with an international element, the courts have accepted the objection of the parties, rejected their jurisdiction, and referred the parties to arbitration. In the cases where the national courts found that the tribunals are lacking jurisdiction, it was not because there was some sort of pathology with the arbitration agreement, but rather because they considered that either the parties had failed to raise a timely objection to the jurisdiction of

an arbitral institution. Finally, while there are no specific rules, it is in principle accepted that arbitration clauses do not extend to non-signatories.

When it comes to the composition of the arbitral tribunal, there are no limits to the parties' autonomy to select arbitrators when the seat of the arbitration proceedings is in North Macedonia. The LICA contains detailed provisions related to the composition of the arbitral tribunal. In line with the principles of the UNCITRAL Model Law, the LICA adopts the principle of "competence-competence." However, this jurisdiction is concurrent since national courts can also conduct a more thorough analysis of the tribunal's jurisdiction. Both arbitration theory and practice acknowledge the confidential character of arbitration. When it comes to evidence in the proceedings the LICA only contains a very general obligation providing that the power conferred upon the arbitral tribunal also includes the power to determine the admissibility, relevance, materiality, and weight of any evidence. The IBA Rules on the Taking of Evidence in International Arbitration which is a significant instrument designed to aid the tribunal and the parties to the proceedings in the taking of evidence are rarely used in proceedings in North Macedonia. So far, they have been used only once, in a pending case in front of the PCA.

According to Macedonian legislation, the following disputes are considered non-arbitrable: disputes regarding the status of legal entities; the validity of the entry in public registers established in the Republic of North Macedonia; registration and validity of industrial property rights if the application was submitted in the Republic of North Macedonia; disputes regarding ownership, disturbance of possession, lease or rent of real estate, if it is located on the territory of the Republic of North Macedonia; and disputes regarding ownership, lease or disturbance of possession on ships and aircraft if they are registered in a registry in North Macedonia, or the disturbance occurs on the territory of the country.

Concerning the parties' representation in arbitral proceedings seated in North Macedonia, the national legislation contains no limitations or restrictions. However, contingency fees are strictly prohibited. Concerning the allocation of costs for the arbitration proceedings, in absence of any agreement between the parties, the "loser pays" principle applies.

The grounds for setting aside an arbitral award are a verbatim adoption of the grounds from the UNCITRAL Model Law. The Republic of North Macedonia is a contracting state of the New York Convention, and consequently, the grounds for the refusal of recognition and enforcement of foreign arbitral awards in North Macedonia are those set in Article V of the Convention. The procedure for recognition of a foreign arbitral award is established in the Private International Law Act, and the procedure for enforcement is contained in the Law on Enforcement.

Concerning arbitral institutions, it can be emphasized that although there are three fully functional economic chambers in the country, which contain rules related to arbitral institutions, currently only one has a fully functional permanent arbitral institution – The Permanent Court of Arbitration (PCA) attached to the Economic Chamber of North Macedonia. To improve and modernize the organization and functioning of the arbitral institution and to meet the current practices in this field, in 2021 new Arbitral Rules of the PCA were adopted. The rules also contain provisions regarding emergency arbitrators. However, aside from this novelty, there are no specific rules adopted by the PCA related to expedited proceedings or electronic arbitration.

Concerning the arbitration practice, according to the data provided by the PCA, in the last seven years, 47 arbitration cases have been filed before the Court. 68% of the disputes were without an international element and 32% of the disputes had an international element. For the past seven years, most of the initiated arbitration proceedings are regarding debt collection (84%) and compensation for damage (10%). The proceedings were mainly for claims arising from sales contracts (24%), public procurement contracts (19%), and construction contracts (19%). In general, the duration of the arbitration proceedings in front of the PCA is six to nine months. In relation to *ad hoc* arbitration, there are no existing records that a dispute has been resolved by an ad hoc arbitration seated in the Republic of North Macedonia. According to Macedonian legislation, ad hoc arbitration is permitted only for international disputes.

While the country has implemented a legal framework on arbitration which is mostly in line with the international framework, the promotion of arbitration in the Republic of North Macedonia is going slowly and with modest results. In the global commercial community, North Macedonia has an image as a country that is not entirely arbitration prone. Although the modern normative framework has been (partly) established over a decade ago, arbitration in North Macedonia is still in its infancy: arbitration is neither well-known nor well-exploited. At least so far, our society has shown no inclination toward the ADR methods of resolving disputes in general, given that the tradition to litigate is still dominant. Notwithstanding the efforts that have been undertaken in recent years to promote arbitration in North Macedonia, much still needs to be done to develop an arbitration culture among businesses.

Investment arbitration is regulated by laws, bilateral and regional investment treaties concluded by the country, as well as relevant multilateral conventions. The most relevant domestic regulations are The Law on International Commercial Arbitration (LICA) and the Private International Law Act (PILA). The country has concluded a total of 43 bilateral investment treaties (hereinafter BITs), of which 39 are currently in force. The country uses a model BIT determined in 2009 but

is currently in the process of preparing a new model BIT. The country is also a party to important regional investment treaties, such as the Energy Charter Treaty. The Republic of North Macedonia is a party to the ICSID Convention, as well as to the New York Convention. However, the country has not yet accepted the Mauritius Convention.

North Macedonia does not have a unified investment law. Rather, investments are regulated in several different acts, among others, the Law on Foreign Exchange Operations, the Law on Trade Companies, the Law on Technological Industrial Development Zones, the Law on Financial Support of Investments, and the Law on Strategic Investment in the Republic of North Macedonia.

Under BITs concluded by North Macedonia usually "investors" are considered natural persons who are citizens of the contracting party and legal persons including, enterprises, companies, corporations, business associations, or organizations established or organized in accordance with the respective state legislation of either contracting party having their seat and their main activities in the territory of that contracting party; The definition of "investment" generally has a very wide scope. "Investment" is usually defined as "any kind of asset", followed by a non-exhaustive illustrative list of types of investments protected under the BIT. Among others, the types of investment usually explicitly mentioned as protected in BITs are property, guarantee, and property rights; shares, stocks, and other debentures in companies; monetary claims relating to investments; intellectual and industrial property rights; and rights of financial nature granted by law or agreement.

With respect to investment arbitration practice, as of today, there have been 10 (ten) investment arbitration cases brought against North Macedonia, most of them initiated in recent years and several still ongoing. ICSID arbitration is most commonly commenced against the country, with ICC arbitration also proving popular among claimants. No investor from North Macedonia has even initiated investment arbitration.

Notices of dispute against North Macedonia are sent to the Government, as a governing body that handles investment arbitration cases. In 2017, the Government founded the Coordination Body for Monitoring Arbitration Proceedings Arising from International Treaties. This Coordination Body is responsible for monitoring, on behalf of the Government, all arbitration proceedings where North Macedonia appears as respondent. It is comprised of state officials and experts. The Coordination Body is especially tasked with briefing the Government on all matters of relevance regarding the arbitration proceedings, communicating with the legal representatives

of the state, and coordinating the communication between the state authorities and the legal representatives.

In investment arbitration, North Macedonia is usually represented by foreign international law firms, with experience and expertise in international arbitration. These foreign counsels usually engage a local law firm for assistance with domestic law matters, obtaining evidence and required documents, communication with state authorities, witnesses, etc. There is no formal procurement process when engaging law firms for representation. Under the Law on Public Procurement, the procurement process of legal representation for international and foreign arbitration, court, and conciliation proceedings is exempted from the rules applicable to public procurement procedures. According to publicly available information from Government sessions, the usual procedure is that the Government sends a direct request for bids to several international law firms and chooses the firm whose offer it deems most acceptable.

Regarding recognition of arbitral awards, the same procedure for commercial arbitration applies to non-ICSID arbitration. For ICSID cases, the ICSID convention applies, and according to article 54(1) "each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State." Concerning enforcement of the awards, the Law on Enforcement exempts from execution assets in ownership of the Republic of North Macedonia and its bodies, units of local self-government, and public enterprises which are necessary for the performance of government and public activities and tasks. However, there are no public records of any enforcement proceedings initiated against North Macedonia for non-compliance with an arbitration award. In relation to adverse ICSID awards, North Macedonia has not sought annulment proceedings to date.

In comparison to other forms of ADR, **mediation** is more prominent, primarily because in 2015 with the amendments of the CPA, when it was provided as mandatory for commercial disputes with a value of up to 1,000,000 MKD. Currently, mediation is regulated by the Mediation Act (MA) enacted in December 2021, which entered into force in January 2022. The MA is the third novel law regulating mediation. Namely, mediation was first introduced as an alternative dispute resolution mechanism by the Mediation Act in 2006, which was supplemented in 2013. However, the laws proved faulty in practice. Hence, the latest act was enacted with the purpose to improve the legal conditions for the implementation of the law in practice, ensuring equal application of the provisions by the mediators, and providing better solutions for the promotion of mediation as a dispute resolution mechanism and its results. In addition to the MA and the CPA, the Law

on Obligations applies to the conclusion, legal force, and termination of the mediation settlements, as well as in relation to the material liability of the mediator. Also, provisions for special optional mediation procedures in criminal law matters are incorporated in the Criminal Procedure Act for cases of prosecution by a private lawsuit and the Act on Justice for Children for cases of a crime punishable by imprisonment up to 5 years. North Macedonia also signed the Singapore Convention on Mediation on 7 August 2019. However, the Convention has not yet been ratified.

Regarding the practice of mediation in the country, according to data obtained from the Ministry of Justice for this report, from 2016 to 2021, the total case count for mediation is 3497. In almost half (49.5%) of the cases the parties reached a settlement.

It should be noted, however, that different data on the country's mediation case count is being presented by the Chamber of Mediators. The number of reported and registered cases in the Registry of Mediation Procedures of the Ministry of Justice does not coincide with the number of cases recorded in the individual registries of the mediators. Hence, at the moment there is strong inconsistency in the statistical data of the mediation practice in the country. To overcome such inconsistency and keep relevant track of the mediation practice, an e-Registry of Requests for Mediation was formed in 2020.

There is strong support for mediation in the country from many stakeholders. The Government strongly supports the promotion of mediation as a viable alternative to taking cases in front of national courts. National judiciary as well as other actors from the justice system are also strongly encouraged to promote mediation as a viable dispute resolution mechanism and are even obliged by law to suggest mediation to the parties for certain types of disputes. Unfortunately, a 2021 study report aimed at assessing the view and perception for mediation of the employees in the private sector and public administration in North Macedonia shows that there is lack of information regarding mediation. Namely, the findings of the study show that mediation is perceived as a viable alternative for dispute settlement by the persons informed of mediation, however, the majority of the public remains uninformed of mediation.

In relation to the subject matter, the types of disputes which may be subjected to mediation are: property disputes arising from inheritance proceedings; family disputes; labor disputes; commercial disputes; consumer disputes; insurance disputes; disputes arising from procedures for notary payment orders; disputes related to education; disputes related to health and safety at work; disputes related to the protection of the environment; disputes related to discrimination; disputes related to civil liability for insult and defamation; as well as other types of disputes

between domestic and foreign natural persons and/or legal entities in which mediation corresponds to the nature of the dispute and may aid in its resolution.

A valid mediation agreement requires that the parties must at least attempt to resolve their dispute by mediation. In case when a party seeks court protection and has not initiated mediation before resorting the dispute to court, the court may dismiss the claim. Hence, in case of a valid mediation agreement, the party may not directly seek court protection of its claim, regardless of whether it refuses to mediate. Similarly, in case of a dispute which is subject to mandatory mediation in accordance with the CPA, the claim submitted to the court without the attempt to mediate the dispute bears the same legal effect.

A prerequisite for obtaining a mediator license is passing the mediator exam. The conditions provided by law for taking the mediator exam refer to relevant education, training, work experience, citizenship of the Republic of North Macedonia, and passing relevant psychological and integrity tests. The license is issued by the National Council on Mediation. Licensed mediators are obliged by law to undertake continuous professional improvement and advancement. Currently, there are 46 licensed mediators.

Mediation settlement agreements are binding to the parties even if not sanctioned by the court. However, mediation settlement agreements are not an enforceable title, unless their content is solemnized by a notary public or verified/confirmed by the court in a court procedure. On the other hand, mediation settlement agreements that have no legal validity of an enforcement title may be enforced in national courts as binding contracts between parties in accordance with Law on Obligations. There is no special procedure for challenging a mediation settlement agreement. According to Article 29 of the MA, the provisions of the Law on Obligations govern the conclusion, effect, and termination of the mediation settlement.

At the moment, there is no domestic entity offering institutional mediation. However, parties are free to choose mediation offered by foreign mediation institutions as a dispute resolution mechanism.

In summary, while a national legal framework that is in line with the international framework for ADR has been adopted, from the report it is also evident that some areas need to be addressed in the near future. A major setback in the establishment of effective ADR mechanisms is also the low level of familiarity of the general public with ADR, as well as the lack of cooperation and joint effort among all stakeholders.

It can be concluded that although in the past decades, there have been many attempts to stimulate ADR mechanisms, it is evident that the efforts have not achieved satisfactory results. In line with this, this report is the initial step in the process of strengthening the ADR mechanisms in the country and promoting them as a viable alternative to court litigations. While this report focuses on the existing legal framework in the country on ADR, at the same time it lays the foundations for further research and activities, focusing on the identification of legal gaps, engaging stakeholders in the process of further reforms, as well as providing the basis for further training and education in the sphere of ADR, and raising the level of familiarity with ADR mechanisms in the Republic of North Macedonia.

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