German Arbitration Focus

German Institution of Arbitration
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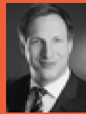
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The German Arbitration Institute confirmed in 2010 that the value of disputes before the arbitral body had exceeded the EUR 1 billion (£903 million) mark for the first time. According to reports, the statistics indicated an increasingly positive attitude of German parties towards international arbitration, and demonstrates the increased appeal of Germany to foreign parties engaged in disputes.

In The European & Middle Eastern Arbitration Review 2011, Robert Hunter and Karl Pörnbacher of Hogan Lovells International LLP noted that the German courts have continued to uphold the autonomy of arbitration as a means of dispute resolution replacing state courts, and are very hesitant to set aside an arbitral award. They said that this pro-arbitration approach is evident in a 2009 decision of the German Federal Court of Justice (BGH).

The BGH confirmed the arbitrability of disputes concerning the validity of a shareholder resolution in a limited liability company. The court thereby overturned its former decision in which the court had excluded the arbitrability of those disputes.

Mr. Hunter and Mr. Pörnbacher noted: "The case gives reasons for the shift by stating the predominant majority opinion among scholars which has been developed since [the former decision]. The court also defines minimum standards that need to be fulfilled by the arbitration clause to constitute a valid reference to arbitration for such disputes. First, the arbitral proceeding has to ensure that shareholders have the same quality of legal remedies as in state court proceedings.

"Second, the quality of a decision of a state court as having validity among all other shareholders also has to be guaranteed in arbitration. (This requires all shareholders to have access to the arbitration and give them the right to influence the process of appointing arbitrators.)

"Third, all conflicts that might arise out of the dispute have to be heard at one tribunal. In the original case the court did not deem those requirements fulfilled and in the end denied a defence for priority of arbitration."

Mr. Hunter and Mr. Pörnbacher added that a further point factoring into Germany's pro-arbitration status relates to the country's investment treaty programme – which has contributed to Germany's economic success for more than half a century.

By June 2010, Germany had signed 138 bilateral investment treaties (BITs) which are characterised by progressive standards of investment protection. 130 of these are currently in force, making Germany the world leader in terms of the number of its BITs. Taken together with the EC and the OECD, Germany's treaty regime provides an almost complete global network of international investment protection.

Less contentious than litigation

Alexander Demuth is a senior director at Alvarez & Marsal Dispute Analysis & Forensic Services GmbH. Since 1983, Alvarez & Marsal (A&M) has set the standard for helping organisations solve complex problems, boost performance and maximise value, and is home to more than 1,700 professionals in offices across North America, Europe, the Middle East, Asia and Latin America.

A&M advises clients on commercial, financial and operational impacts of settlements in all forms of ADR, particularly when the parties will continue their relationship following the dispute – such as with joint-ventures and long-term contracts.

According to Mr. Demuth, A&M offers global, cross-disciplinary teams with practical operational and industry expertise tailored to specific case needs. He noted: "We work quickly to deliver accurate and comprehensive results and to simplify complex concepts for courts,

juries, arbitrators, mediators and regulators. In addition, A&M is free from audit-based conflicts-of-interest, and provides objective advice for each unique situation."

The German Institution of Arbitration (DIS) has gained a reputation in recent decades for handling cases in a smooth and speedy manner. An important feature of the DIS Arbitration Rules is the flexibility they offer – giving individual procedural agreements priority over any non-mandatory rules wherever possible.

In 2010, the DIS published a new set of ADR rules to provide a wide choice of procedures to suit parties. These include: Conflict Management Rules, which provide parties with an institutionalised possibility to deal with the choice of the appropriate resolution instrument in a structured process with professional support; Rules for Expertise when the parties require a non-binding decision by a neutral person; and Expert Determination Rules when the parties require a preliminary binding decision by a neutral person.

Mr. Demuth noted that the number of proceedings under DIS rules have increased over time. Approximately 30% of DIS proceedings involve a foreign party, while approximately 20% are conducted in English – trends which are also growing. The most common areas for German arbitration include construction, contract and post-M&A disputes.

He said: "Further, our experience is that arbitration is the preferred method for the settlement of business disputes in Germany. The reasons for this include DIS flexibility, confidentiality, and that arbitrations are usually less contentious than litigation. Additionally, arbitration allows for selection of arbitrators with more experience than courts with specific issues."

International arbitration – increasing in popularity

Bach, Langheid & Dallmayr is Germany's largest law firm specialised on insurance and liability law only, and is celebrating its 100th anniversary this year. More than 100 lawyers work in four offices (Cologne, Munich, Frankfurt and Berlin). In addition, for several years, BLD has extended its international network in handling high profile cases. In co-operating with independent partners throughout Europe and in the US, BLD stays in close contact with the international insurance market and different branches in the industry.

According to Dr. Martin Alexander, partner with the firm, international arbitration is becoming more and more popular – especially in cross-border product liability cases. With a team of more than 25 lawyers specialised on liability matters, BLD is able to handle larger cases which are mostly coming from the automotive, life-science, medical-devices, pharma and foodstuff sectors.

Dr. Alexander noted that, crucially, BLD is familiar with the latest development in German and European case law as well as the latest regulations and laws in all field of product liability.

He said of the changing shape of the arbitration industry: "The United Nations Convention on Contracts for the international Sale of Goods (CISG) has more been applicable than the German Civil Code (BGB) to our recent German arbitration cases. This demonstrates how the international flow of goods (i.e. production in China, Eastern Europe i.e.) has its effects on the applicable law, and also shows that the CISG is getting more popular.

"Since parties tend to distrust stately courts at the contracting partner's seat, arbitration itself is becoming increasingly popular – especially since proceedings can be held in English or in another language the parties agree upon."

Dr. Alexander concluded: "Further, despite recent economic tumult, the downturn had quite the opposite effect on BLD. Many cases, especially between system supplier and OEM in the automotive sector, were fought out in court – and these are matters which would have been settled without arbitration previously."

Beyond the pure application of arbitration…

HEUSSEN Rechtsanwaltsgesellschaft is one of Germany's largest law firms with offices in Berlin, Frankfurt, Munich and Stuttgart. As well as working closely together with HEUSSEN B.V. in Amsterdam and HEUSSEN Italia Studio Legale e Tributario in Rome, Milan und Conegliano (Treviso), HEUSSEN takes an international, multi-disciplinary approach and works closely together with tax advisers, auditors and corporate finance consultants.

An important feature of the DIS Arbitration Rules is the flexibility they offer – giving individual procedural agreements priority over any non-mandatory rules wherever possible.

According to Renate Dendorfer, partner with the firm, the German arbitration system is – like the understanding of civil procedure – proactive and focused on the best solution for the parties, which is often a settlement considering the economic needs of the parties.

"Clients are often critical regarding the 'Arbitration Route' and consider arbitration as time-consuming, expensive and focused on legal issues. They increasingly demand our advice in other ways of dispute resolution, e.g. mediation or conciliation."

In regards to pending changes to legislation which may affect the firm's arbitration offering, Ms. Dendorfer cited the following example:

"Beyond the pure application of mediation in the commercial setting, several large companies (DAX companies) founded in 2008 the Round Table Mediation and Conflict Management of German Major Enterprises. This initiative focuses on the implementation of mediation and conflict management in the business field. There are quarterly meetings organised, as well as working teams for certain topics and knowledge transfer on mediation and conflict management.

"In 2010, the DIS Konfliktmanagementordnung (DIS-KOM) became effective. The focus of DIS-KOM is the support of the parties to decide on the best available proceeding for the concrete dispute. The goal is to find the most effective proceeding for each dispute in order to meet the parties' economic, legal and further interests. The parties are supported by a conflict manager who has no power for decision but provides proposals regarding the best choice for a proceeding."

A modern dispute resolution mechanism

Based in Berlin, lindenpartners was founded in 2006 and currently has 25 lawyers, 13 of whom are partners. The majority of the firm's partners have previously worked as partners or senior associates in the most reputable German and international firms, including Freshfields, Clifford Chance and Hengeler Mueller.

Dr. Alfried Heidbrink, partner, explained: "Our arbitration practice covers domestic German as well as international arbitration. We act both as counsel to parties and as arbitrators, in each case primarily in post-M&A and other corporate cases, as well as in disputes arising under general commercial and contract law.

"Especially in our practice as arbitrators, we clearly benefit from our reputation and contacts in the world of 'Big Law', and it helps us that we are a small, single-office outfit where conflicts of interest are rare."

Arbitration has become increasingly popular in the German business community, in particular since Germany has adopted the United Nations Commission on International Trade Law (UNCITRAL) model rules in 1998.

According to Mr. Heidbrink, most M&A agreements in Germany now include arbitration clauses. He added that although this is difficult to prove for lack of solid statistical evidence, it is probably safe to assume that at least in post-M&A and other corporate disputes, institutionalised arbitration is presently much more common than ad hoc arbitration. "Even in cases where at least one of the parties is not from Germany, the most popular arbitral regime is that of the DIS, followed by the ICC arbitration rules," he said.

There are a factors contributing to DIS arbitration's popularity in today's business climate. The procedure under the DIS rules is flexible and non-bureaucratic. In addition, DIS arbitration can be conducted in German, English or any other language the parties may agree on; meanwhile, the cost of having an arbitration matter administered by DIS is moderate – capped at EUR 37,500 plus VAT.

Dr. Heidbrink continued: "Arbitrators' fees in DIS proceedings are also predictable in that they are defined as a specific amount depending on the amount in controversy – rather than a discretionary amount taken from within a broad range or a fee based on time spent.

"A final factor – and one which cannot be stressed enough from a user's standpoint – is that the DIS secretariat in Cologne is extremely efficient and pleasant to work with. These factors all increase the acceptance of arbitration as a modern dispute resolution mechanism."

Changes approaches to arbitration

According to Theo Paeffgen, a solicitor at Bonn-based Paeffgen Rechtsanwaltsgesellschaft mbH, the arbitration system in Germany is well-established; meanwhile, the areas of law proving most resilient at present are commercial, civil and corporate.

Mr. Paeffgen said that, in particular, domestic and international dispute resolution in the media and entertainment industry has been a large area of the firm's practice since 2003 – with lawyers from Paeffgen representing German professional football clubs in international FIFA and UEFA disputes with players, international professional football clubs, player agents and even FIFA itself.

Arbitration has become increasingly popular in the German business community, in particular since Germany adopted the UNCITRAL model rules in 1998.

"Our arbitration practice, however, is not limited to the media and entertainment industry," he noted. "Disputes arising in the aftermath of cross-border corporate finance transactions have equally been part of our practice."

Mr. Paeffgen said that, for Paeffgen, the key to success is the long-term and well-founded experience of the firm's lawyers with the two very different legal systems of the world – as well as their underlying fundamental cultural differences of the individual participants.

"This combination encompasses the Anglo-American common law society, culture and legal system, as well as the 'old world' Roman-based society, culture and legal system," he explained. "Paeffgen's lawyers are qualified to represent clients in Court in both of these legal systems."

He added: "In dispute resolution, wherein matters cross the border between these two very different worlds, the level of understanding in the lawyer's mind is the key to success for the client. Certainly, what comes as a first line of argument in a dispute will always be the application of law – but the resolution of a dispute between parties from fundamentally different systems can be handled economically, whilst emphasising transparency."

Mr. Paeffgen concluded that the proper crafting of terms in agreements is the only way to increase the stability of a client's relationship with a contracting party. Paeffgen's practice emphasises an application of due diligence that law makers may overlook. "From our firm's perspective, this is part of our practice of dispute resolution by avoidance of uncertainties," said Mr. Paeffgen

Germany's leading role

In a piece entitled Past, Present, and Future Perspectives of Arbitration published by Arbitration International, Dr. Karl-Heinz Böckstiegel, chairman of the DIS noted that: "National legislators will continue to be pushed by their own constituencies, particularly their business communities, to adapt their respective legal frameworks to the demands of international business practice for efficient dispute settlement machineries."

He added: "In a more and more globalised economy and contract practice, regional differences will become less important. A globalisation of arbitration can also be noted as parties seem less and less to take the traditional approach of selecting arbitrators from their own legal background, but rather select arbitrators from any region of the world whom they consider best equipped for the particular case."

In addition, the existence of Germany's 138 bilateral investment treaties – 130 of which are currently in place – has encouraged both outward and inward foreign investment as well as international cooperation. This, combined with the country's use of the harmonising UNCITRAL model to encourage cooperation across borders, means that Germany is well-positioned to continue to develop, influence and innovate in its contribution to the global arbitration industry.