DISPUTE RESOLUTION

Germany

LEXOLOGY
Getting The Deal Through

Consulting editor
Latham & Watkins LLP

Dispute Resolution

Consulting editors

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Latham & Watkins LLP

Quick reference guide enabling side-by-side comparison of local insights into litigation, arbitration and alternative dispute resolution (ADR) worldwide, including court systems; judges and juries; limitation issues; pre-action behaviour, starting proceedings and timetable for proceedings; case management; evidence; remedies; enforcement; public access; costs; funding arrangements; insurance; class action; appeals; foreign judgments and proceedings; the role of the UNCITRAL Model Law on International Commercial Arbitration; choice of arbitrator; arbitration agreements and arbitral procedure; court interventions in arbitrations; awards; types of ADR; requirements for ADR; other interesting local features; and recent trends.

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LITIGATION

Court system

What is the structure of the civil court system?

Except for Germany's highest civil court, the Federal Court of Justice, all civil courts are at state level. The structure is nearly identical in all states: there are district courts, regional courts and higher regional courts. Only in Bavaria is there also a state supreme court, which has jurisdiction over matters that in other states would be decided by higher regional courts.

District courts act exclusively as first instance courts, mainly for disputes with an amount in dispute not exceeding €5,000 (subject to exceptions). Regional courts not only act as first instance courts in most cases falling outside the district courts' jurisdiction, but also have appellate jurisdiction over decisions of district courts. Higher regional courts act as entry-level courts for capital market test cases and for most arbitration-related matters. Their main function, however, is to act as appellate courts for regional court decisions. The Federal Court of Justice, in turn, mainly hears further appeals against appellate decisions.

At district court level, cases are decided by single judges. Regional courts and higher regional courts have chambers composed of three judges; however, in practice, most cases at regional court level are decided by one of the three judges as a single judge. At the Federal Court of Justice, each chamber has six to eight judges, with cases being usually decided by a panel of five.

At higher regional courts and at the Federal Court of Justice, the chambers garner special expertise in certain fields because cases are allocated to the chambers based on subject matter. In addition, for first instance commercial law matters, many regional courts have a specialised chamber that is composed of one professional judge, acting as chair, and two lay judges, who are merchants proposed by the chamber of commerce. Similarly, higher regional courts and the Federal Court of Justice have dedicated chambers for antitrust law disputes.

Law stated - 25 March 2022

Judges and juries

What is the role of the judge and the jury in civil proceedings?

There are no juries in civil litigation. The judges control the procedure and, where necessary, render the judgment. Procedurally, they will, inter alia, set the timetable, promote amicable settlements and safeguard the efficiency of the proceedings as well as the parties' due process rights.

Furthermore, judges take a very active role in the taking of evidence. They will hear evidence only on disputed facts that they deem legally relevant, regardless of whether the parties have proffered further evidence. In addition, witnesses and experts are primarily examined by the judge, not by the parties, and expert witnesses are selected and instructed by the court (while parties may submit expert testimony, this qualifies as pleadings rather than evidence).

However, the judge is in the hands of the parties regarding the subject matter of the dispute and the submission of facts. In particular, the court is bound by the parties' requests for relief. Similarly, the parties may remove the case from the court's consideration. Moreover, in principle, judges may only take into account those facts that have been presented by the parties, and they must accept as true those facts that are undisputed between the parties.

Law stated - 25 March 2022

Limitation issues

What are the time limits for bringing civil claims?

Under German law, the statute of limitations is a merits issue. The standard limitation period is three years. It begins at the end of the year in which the creditor became or should have become aware of the identity of the debtor and of the circumstances giving rise to the claim. However, different periods apply for certain types of claims. In addition, there are maximum limitation periods that are independent of the creditor's knowledge (mostly 10 or 30 years).

In certain cases, the limitation period may be suspended (eg, during negotiations or legal proceedings) or it may start anew (eg, if the debtor acknowledges the claim). Parties may agree on prolonging limitation periods, but only up to a maximum of 30 years.

Law stated - 25 March 2022

Pre-action behaviour

Are there any pre-action considerations the parties should take into account?

There is no pretrial discovery or disclosure (ie, each party must gather its evidence by its own). However, there are certain other mechanisms mitigating the problem of building one's case if one lacks the requisite information:

- Substantive law may, in some cases, provide the other party with certain information rights.
- Courts have the power to order a party to the proceedings or a third party to submit documents or other objects in its possession. In practice, however, such orders are rarely made.
- A party's burden of substantiating and proving its case may be eased or may even shift to the other party in certain cases; for example, if the party bearing that burden cannot reasonably be expected to have access to the relevant information or evidence, or the counterparty took active measures to prevent it from obtaining such access.

Finally, before filing a claim, a claimant should always contact the opposing party and ask for fulfilment of the claim. Otherwise, if the defendant immediately acknowledges the claim once filed, the claimant will need to bear the costs of the proceedings.

Law stated - 25 March 2022

Starting proceedings

How are civil proceedings commenced? How and when are the parties to the proceedings notified of their commencement? Do the courts have the capacity to handle their caseload?

Proceedings are initiated by filing a written statement of claim. The statement must indicate at least the parties, the court, the subject matter, the grounds for the claim and the request for relief. However, the matter becomes legally pending only once the statement of claim is served on the respondent by the court. The court will effect service only if the aforementioned formal requirements are met and after the claimant has paid the full court fees.

While German civil courts have a fairly high caseload, they still manage to dispose of cases quite swiftly; on average, first instance proceedings in 2020 took 5.4 months before district courts and 10.5 months before regional courts.

Law stated - 25 March 2022

Timetable

What is the typical procedure and timetable for a civil claim?

The statement of claim is served on the opposing party together with a first court order, which regularly provides the respondent with a deadline of at least four weeks to file a reply. Before an oral hearing takes place, the parties are usually given the opportunity to file a second round of submissions.

Service of the summons for a hearing must occur at least one week prior to the hearing. Normally, the oral hearing begins with the judge summarising the parties' relevant submissions, providing a preliminary legal assessment and exploring the possibility of resolving the dispute amicably. If no settlement is reached, the parties may then exchange oral arguments.

If relevant facts are disputed, the judge will order the taking of evidence, normally to be conducted at one or more subsequent hearings. At the evidentiary hearing or hearings, the judge may hear the witnesses named by the parties, listen to experts and examine other pieces of evidence. Afterwards, the parties and the judge discuss the results of the taking of evidence. Once the court determines that the parties had the opportunity to present their position on all relevant issues, the court issues its judgment, either at the end of the hearing (very rare) or at a later date. The judgment will be sent to the parties electronically (via a mailbox specially set up for lawyers) or by mail.

Law stated - 25 March 2022

Case management

Can the parties control the procedure and the timetable?

Judges enjoy extensive freedom in shaping the procedure, subject only to certain statutory limits. The parties' influence on the procedure is largely limited to requesting extensions of deadlines or postponements of hearings. Within the confines of due process, it is within the court's discretion whether to grant such requests. In practice, courts regularly grant at least one (usually generous) extension for each of the main deadlines. Similarly, courts are generally very open towards staying the proceedings in the case of settlement discussions.

Law stated - 25 March 2022

Evidence – documents

Is there a duty to preserve documents and other evidence pending trial? Must parties share relevant documents (including those unhelpful to their case)?

All parties have a procedural duty to tell the truth. However, this does not prevent them from making factual pleadings that they only assume (rather than know) to be true. Moreover, parties need not submit all the facts or evidence that may be relevant to the dispute, provided that this omission does not render their submissions so misleading that it amounts to not telling the truth.

Law stated - 25 March 2022

Evidence – privilege

Are any documents privileged? Would advice from an in-house lawyer (whether local or foreign) also be privileged?

As there is generally no obligation to produce documents, privilege of documents does not exist. However, lawyers have the right to refuse to testify about any circumstances entrusted to them in the context of their appointment. The same applies to in-house lawyers, but only to the extent that such a lawyer became aware of the facts concerned while working for his or her employer as counsel.

Law stated - 25 March 2022

Evidence – pretrial

Do parties exchange written evidence from witnesses and experts prior to trial?

Generally, no.

Law stated - 25 March 2022

Evidence – trial

How is evidence presented at trial? Do witnesses and experts give oral evidence?

The court will take evidence only if the fact to be proven:

- is pleaded with sufficient specificity (no fishing expedition);
- is disputed between the parties;
- is legally relevant in the court's assessment;
- is not known by the judge to be true based on other proceedings before the judge or based on public knowledge; and
- has not yet been proven through other evidence.

A party proffering a witness must specify the facts on which the witnesses will testify. At trial, the witness is requested to share whatever knowledge they have in relation to those facts. The court will ask questions, where necessary, and subsequently invite the parties to ask questions. There is no witness conferencing and no culture of cross-examination.

Expert testimony is proffered by specifying the facts on which an expert shall be heard. The court will then select a suitable expert (unless the parties agree on an expert). Usually, the person appointed as an expert will submit a written expert opinion. In the case of ambiguities or contradictory opinions of different experts, the experts may be heard at a hearing in accordance with the rules on the examination of witnesses.

Law stated - 25 March 2022

Interim remedies

What interim remedies are available?

German law distinguishes between two forms of interim remedies – 'seizure' and 'interim injunctions' – both of which are available while (national or foreign) proceedings are pending or imminent.

Seizure serves to secure payment. It allows for the seizing of individual assets or the restriction of a debtor's freedom of movement. Seizure is tantamount to an interim freezing injunction under UK law.

Interim injunctions mainly serve to secure non-pecuniary claims. They are available when there is justifiable concern that a change of the status quo might frustrate the realisation of the claimed right or make its realisation significantly more difficult.

There is no search order in German civil law. However, if a party has a substantive right to information, it can file an 'action by stages'. This action enables the claimant to combine a claim for performance, for which the claimant still lacks information, with a claim for disclosure of the relevant information. A judgment granting disclosure can be enforced like any other judgment.

Law stated - 25 March 2022

Remedies

What substantive remedies are available?

There are three different types of actions:

- action for enforcement of a claim (eg, payment or the omission of a certain act);
- action for a modification of rights (eg, annulment of a company resolution); and
- action for declaratory judgment (serving mainly to clarify the existence or non-existence of a legal right).

Punitive damages are not available.

Unless substantive law provides for interest from an earlier date, interest accrues as of the date on which the litigation becomes pending.

Law stated - 25 March 2022

Enforcement

What means of enforcement are available?

Depending on the obligation that the judgment relates to, available enforcement measures differ.

In relation to payment obligations, the creditor may request that:

- the movable property of the debtor be seized and sold;
- claims of the debtor against third parties be assigned to the creditor; and
- real estate of the debtor be subjected to forced sale or administration, or that a mortgage be registered in favour of the creditor.

For obligations to surrender an object to the creditor, the bailiff takes the object from the debtor and hands it over to the creditor.

In the case of an obligation to perform an act, the creditor may request authorisation to perform the act him or herself at the debtor's expense. If only the debtor personally can perform the act (or if the debtor is obliged to omit a certain act), the court can order a coercive payment or coercive imprisonment to make the debtor perform or omit the relevant act.

Law stated - 25 March 2022

Public access

Are court hearings held in public? Are court documents available to the public?

Apart from a few, narrow exceptions (eg, protection of trade secrets), all hearings are public. However, third parties may not access the files of a case without the consent of the parties unless they demonstrate a legitimate interest that outweighs the parties' confidentiality interests.

Law stated - 25 March 2022

Costs

Does the court have power to order costs?

The court determines which of the parties must bear which proportion of the court's fees and expenses, and in which proportion either party must (partially or fully) reimburse the other party for its legal fees and expenses. The exact amounts will then be determined in a separate procedure by a judicial officer.

In principle, courts impose costs on the unsuccessful party. If neither party prevails in full, the court will be guided by the percentages by which each party prevailed (comparing the operative part of the judgment with the parties' requests for relief).

Even if a party prevails in full, it will only be reimbursed statutory legal fees (which depend on the amount in dispute), even if the actual fees were higher.

Claimants are required to deposit the full court fees upon filing of the claim. Furthermore, claimants with their habitual residence or seat outside the European Economic Area may be required to provide security for the full costs of the proceedings upon the request of the defendant (subject to certain exceptions).

Law stated - 25 March 2022

Funding arrangements

Are 'no win, no fee' agreements, or other types of contingency or conditional fee arrangements between lawyers and their clients, available to parties? May parties bring proceedings using third-party funding? If so, may the third party take a share of any proceeds of the claim? May a party to litigation share its risk with a third party?

In principle, contingency fee arrangements are not permitted, subject only to narrow exceptions. For example, contingency fees are legal if the client would otherwise be discouraged from pursuing legal action, given the economic situation of the client and the financial risks of the proceedings.

Third-party funding closes the gap left by the general prohibition of contingency fees. Funders usually finance court fees and legal expenses and are entitled to a share in the proceeds. By contrast, it is not customary that a claimant sells a proportion of any recovery to investors in return for a fixed upfront payment (or that a defendant pays a fixed sum to offset a proportion of any liability).

Law stated - 25 March 2022

Insurance

Is insurance available to cover all or part of a party's legal costs?

In 2020, there were 44 insurance companies across Germany offering different types of legal expense insurance. Private legal protection, for example, covers the costs of a legal dispute as a private person, but is limited to certain areas of law and usually covers only the statutory legal fees. Companies frequently take out more extensive corporate legal protection and directors' and officers' insurance.

Law stated - 25 March 2022

Class action

May litigants with similar claims bring a form of collective redress? In what circumstances is this permitted?

Collective redress was traditionally viewed critically in Germany, particularly in view of American class actions. This changed to a certain extent on 1 November 2018. Since then, certain qualified institutions in Germany have been entitled to file a 'model declaratory action' with the aim of establishing the existence or non-existence of factual and legal preconditions for business-to-customer claims or legal relationships. A decision on those issues has binding effect for individual claims. However, unless a settlement is reached as a result of the model declaratory action, the parties to individual cases will still need to bring their own actions, even though the model declaratory judgment will considerably limit the scope of issues still to be decided in those individual proceedings.

In addition, on 24 December 2020, Directive (EU) 2020/1828 introduced an EU collective action that will not be restricted to declaratory relief. Instead, claims for damages, repair, replacement, price reduction, termination of contract and reimbursement of payment will also be possible. The Directive will come into force in all 27 member states by mid-2023 at the latest.

Law stated - 25 March 2022

Appeal

On what grounds and in what circumstances can the parties appeal? Is there a right of further appeal?

Appeals are available against final judgments delivered by first instance courts. They are admissible only if the value of the subject matter of the appeal is greater than €600 or the first instance court has granted leave to appeal its judgment.

A further appeal may be filed before the Federal Court of Justice against appellate judgments, but only if the appellate court granted leave to appeal or the appellant succeeds before the Federal Court of Justice with a complaint against the denial of leave. The main requirement for leave is that there are points of law that are of fundamental significance or that require a decision by Germany's highest civil court in the interest of developing the law or ensuring the consistency of jurisprudence.

In principle, appellate courts review the appealed judgment based on the facts established at first instance. The parties may only bring forward new arguments and new evidence if they have not been able to do so at first instance or if new statements are uncontested. However, the appeal court is free to evaluate evidence and may even repeat the taking of evidence. By contrast, the scope of the further appeal to the Federal Court of Justice is limited to points of law.

Law stated - 25 March 2022

Foreign judgments

What procedures exist for recognition and enforcement of foreign judgments?

Judgments from other EU countries, as well as Switzerland, Norway and Iceland, will be recognised and are enforceable in the same way as German court judgments (pursuant to the Brussels I and IIa Regulations and the almost identical Lugano Convention).

Court decisions from the United Kingdom may be recognised and enforced based on the German-British Agreement of 14 July 1960 on the mutual recognition and enforcement of judgments in civil and commercial matters, the Hague Convention of 30 June 2005 on Choice of Court Agreements or German law. Careful consideration should be given to each individual case in terms of the option available for recognition and enforcement and how best to enforce decisions.

Other foreign judgments are recognised only if they are final (ie, not appealable in their state of origin) and if none of the narrow statutory reasons for non-recognition apply (such as violation of res judicata, public policy or basic notions of due process). For a foreign judgment to be enforceable in Germany, the admissibility of its enforcement must be pronounced by a German court.

Law stated - 25 March 2022

Foreign proceedings

Are there any procedures for obtaining oral or documentary evidence for use in civil proceedings in other jurisdictions?

According to the EU Evidence Regulation (No. 1206/2001), courts in other EU countries may request German courts to take evidence for them. The requested court will execute the request in accordance with domestic law. However, the requesting court may also call for the request to be executed in accordance with a special procedure provided for by its domestic law.

With respect to, inter alia, the United Kingdom and Switzerland, the Hague Evidence Convention of 1970 applies. Germany, like most signatories to the Convention, made specific reservations. In particular, it has made a reservation under article 23 of the Convention to the effect that it will not execute letters of request issued for the purpose of obtaining pretrial discovery of documents.

Apart from that, requests for the taking of evidence may be executed according to the Hague Civil Procedure Convention, any bilateral international treaties or general principles of judicial assistance.

Law stated - 25 March 2022

ARBITRATION

UNCITRAL Model Law

Is the arbitration law based on the UNCITRAL Model Law?

Yes. While the relevant chapter of the German Code of Civil Procedure is not a verbatim translation of the UNCITRAL Model Law, most differences are as a result of legal technicalities. The most notable substantive differences are the following:

- German law requires a stricter form for arbitration agreements involving consumers;
- until the arbitral tribunal is constituted, German law allows each party to request a court ruling on whether the arbitration agreement is valid and covers the dispute at hand; and
- if the arbitration agreement gives one party more influence than the other on the selection of the arbitrators, the other party can request that the court appoint the relevant arbitrator or arbitrators instead.

Law stated - 25 March 2022

Arbitration agreements

What are the formal requirements for an enforceable arbitration agreement?

Unless a consumer is involved, the arbitration agreement meets the form requirement if it is contained in:

- a document signed by the parties;
- an exchange of (not necessarily signed) correspondence between the parties that provides a record of the agreement, in particular letters, telefaxes or emails; or
- a document sent by one party to the other or by a third party to the parties to the arbitration agreement, provided that:

In all three cases, it is sufficient if the relevant document refers to another document containing the arbitration agreement, provided that the reference meets the general requirements under German contract law for an incorporation by reference.

If the arbitration agreement involves one or more consumers, it must either be notarised or be contained in a document that is signed by all parties and does not contain any provision unrelated to arbitration.

Law stated - 25 March 2022

Choice of arbitrator

If the arbitration agreement and any relevant rules are silent on the matter, how many arbitrators will be appointed and how will they be appointed? Are there restrictions on the right to challenge the appointment of an arbitrator?

Three arbitrators will be appointed, with each party appointing one arbitrator and the co-arbitrators appointing the chair.

The parties are free to agree on the procedure for challenging an arbitrator. If no such agreement exists, any challenge must be submitted to the arbitral tribunal in writing, setting out the reasons for the challenge, within two weeks of the challenging party becoming aware of the facts on which its challenge rests. Moreover, if a party seeks to challenge the arbitrator that it appointed itself, it can only invoke the grounds for challenge that it became aware of after the appointment. If the arbitral tribunal dismisses the challenge, the challenging party may, within one month, request the court to decide on the challenge.

Law stated - 25 March 2022

Arbitrator options

What are the options when choosing an arbitrator or arbitrators?

The only restrictions are that an arbitrator must be an individual person and must not be a party to the dispute (or any of its legal representatives).

Otherwise, parties are free to choose any person as arbitrator, unless the parties themselves have agreed on requirements to be met by the arbitrators. Arbitrators not meeting these agreed requirements can be challenged. However, such requirements are rarely agreed as this may dramatically narrow the choice of available arbitrators. In addition, it can sometimes be difficult to ascertain with certainty if a candidate meets the requirements (eg, whether the arbitrator is fluent in a certain language). The most common qualification agreed upon in domestic arbitration is that the arbitrator has obtained a German law degree and has passed the bar exam. In international arbitration, parties sometimes agree that the chair should not have the same nationality as one of the parties.

There is quite a large pool of arbitrators in Germany, comprising not only specialised lawyers but also university professors, judges and (to a much lesser extent) technical experts. A number of arbitral institutions seated in Germany, as well as other organisations such as the International Chamber of Commerce Germany, maintain lists of arbitrators, often for special fields of arbitration.

Law stated - 25 March 2022

Arbitral procedure

Does the domestic law contain substantive requirements for the procedure to be followed?

The main mandatory principles are the same as in the UNCITRAL Model Law; namely, that the parties must be treated equally and must be granted a sufficient opportunity to present their case. In addition, German law guarantees the parties' rights to be represented by counsel and to challenge a tribunal-appointed expert for lack of independence or impartiality.

Provided that those principles are respected, the parties can tailor the arbitral procedure to their needs. To the extent that there is neither an agreement of the parties on the procedure nor a fallback provision in German arbitration law, it is for the arbitral tribunal to devise the procedure in its discretion.

Law stated - 25 March 2022

Court intervention

On what grounds can the court intervene during an arbitration?

The court will intervene to make a final determination on arbitral jurisdiction, provided that this ruling is requested by a party:

- before the constitution of the arbitral tribunal; or
- within a month of an arbitral award on jurisdiction.

Moreover, the court will remove arbitrators upon the request of a party if:

- they are unable or unwilling to perform their duties in due time but fail to resign (and the parties are unable to agree on removing such arbitrator); or

- they are successfully challenged in court for lack of independence or impartiality within a month of the challenging party being notified of the arbitral tribunal's dismissal of the challenge.

In addition, upon the request of a party, the court will appoint an arbitrator if:

- the arbitration agreement gives the counterparty more influence over the selection of the arbitrators than the requesting party; or
- if the applicable appointment procedure for the arbitrator fails – in particular, if a party does not appoint its arbitrator or if the parties or co-arbitrators fail to agree on an arbitrator.

Furthermore, the arbitral tribunal (or, with its approval, a party) may request assistance from the court in the form of judicial acts that exceed the powers of the arbitral tribunal (eg, compelling appearance of witnesses, administering an oath to a witness or serving of documents by public notice).

The court's powers as described above cannot be overridden by agreement. However, in some cases, the deadline for the relevant application can be changed by agreement of the parties.

Finally, each party may request interim relief from the court notwithstanding an arbitration agreement or a pending arbitration. According to the prevailing view, the parties cannot validly exclude the court's jurisdiction for interim relief even by way of an express agreement.

Law stated - 25 March 2022

Interim relief

Do arbitrators have powers to grant interim relief?

Yes, unless the parties have agreed otherwise. However, the court retains parallel jurisdiction on interim relief, and it is usually more effective to seek interim relief in court. This is mainly because an arbitral order for interim relief cannot itself be the subject of enforcement measures; instead, this first requires an order from the court.

Law stated - 25 March 2022

Award

When and in what form must the award be delivered?

Unless agreed by the parties, there is no time limit for rendering the award.

The award must be in writing and signed by the sole arbitrator or, in the case of a tribunal, by at least the majority of its members. If not all members of the tribunal have signed the award, the award must indicate the reasons for the missing signatures. While German law also requires the award to indicate the date on which it was rendered and the seat of the arbitration, their omission does not affect the validity of the award. Finally, unless agreed otherwise by the parties, the award must state the reasons on which it is based (failing which, there is a risk that the award may be set aside).

Law stated - 25 March 2022

Appeal

On what grounds can an award be appealed to the court?

Arbitral awards cannot be appealed to the court. Therefore, the court will not hear any argument that the arbitral tribunal's decision is incorrect. However, both domestic and foreign awards may be set aside for the narrow grounds provided in article V of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards and article 34 of the UNCITRAL Model Law. In principle, an application for the setting aside of the award must be filed within three months of receipt of the arbitral award.

Law stated - 25 March 2022

Enforcement

What procedures exist for enforcement of foreign and domestic awards?

Foreign awards, regardless of the country of origin, are recognised and enforced pursuant to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, unless another applicable treaty provides more favourable conditions for recognition and enforcement.

Enforcement of a domestic award requires a court order declaring the award enforceable. A request for this declaration will be refused only if there are grounds for setting aside the award (in which case the court will set aside the award in the same proceedings). Importantly, however, if the counterparty has failed to request the setting aside of the award in a timely manner, the court deciding on the enforceability of the award will not take into account any grounds for setting aside except for a lack of arbitrability and a violation of public policy.

Law stated - 25 March 2022

Costs

Can a successful party recover its costs?

Unless agreed otherwise by the parties, the arbitral tribunal has discretion as to who shall bear the costs of the arbitration (in which proportion) and whether a party may (fully or partially) recover its legal fees and expenses from the other.

Often, when deciding on those matters, German arbitrators tend to look primarily at each party's rate of success (ie, a comparison of the requests for relief and the tribunal's decisions thereon). However, other factors (eg, inefficient procedural behaviour) may also come into play. Arbitral tribunals are not bound by (but remain free to take guidance from) the German ad valorem tables on legal fees recoverable in state court proceedings.

Law stated - 25 March 2022

ALTERNATIVE DISPUTE RESOLUTION

Types of ADR

What types of ADR process are commonly used? Is a particular ADR process popular?

While reliable, up-to-date numbers on the actual use of different ADR methods are difficult to find, some general statements can be made.

First, arbitration, expert determination and (especially in the construction section) dispute adjudication boards are widespread methods for out-of-court dispute resolution in commercial disputes.

Second, conciliation is a very popular ADR method in business-to-consumer disputes. In particular, there are sector-specific conciliation bodies in industries such as insurance, banking, telecommunications, energy and travel. Moreover, in 2020, Germany created a universal conciliation body for areas in which there is no such sector-specific body.

Third, mediation is still a rather underused ADR method in Germany, even though Germany enacted the Mediation Act in 2012 to further promote the use of mediation. A government assessment of the impact of the Mediation Act in 2017 stated that the number of mediations in Germany had remained at a consistently low level (a survey of more than 1,200 mediators revealed 5,000–7,500 mediations per year). Consequently, while there is a large pool of trained mediators in Germany (at least 70,000, out of which an estimated 7,500 practise as mediators), there are not enough cases to allow a significant number of mediators to make mediation their professional focus.

Law stated - 25 March 2022

Requirements for ADR

Is there a requirement for the parties to litigation or arbitration to consider ADR before or during proceedings? Can the court or tribunal compel the parties to participate in an ADR process?

In principle, there is no legal requirement for parties to consider ADR before initiating court or arbitral proceedings. The only exception, which currently applies in 10 of the 16 German states, relates to very specific scenarios that are rarely relevant to commercial disputes (eg, cases involving amounts in dispute not exceeding €750). In those cases, for a claim in court to be admissible, an unsuccessful attempt must have been made to resolve the dispute through conciliation before a certified body.

Once court proceedings have been initiated, however, the court is empowered in all other cases to refer the parties to a specialised judge (otherwise not involved in the proceeding), who will try and help the parties resolve the dispute through ADR processes. If this attempt fails, the court will decide the case (without the involvement of the specialised judge).

In addition, German businesses often agree in their contracts on multi-tier dispute resolution clauses that require, for example, negotiation, mediation or conciliation, or a combination thereof, before a party can initiate arbitration or litigation. Failure to complete any such agreed pre-arbitration or pre-litigation steps will result in the claim being dismissed as inadmissible (without prejudice to filing the claim again later).

Law stated - 25 March 2022

MISCELLANEOUS

Interesting features

Are there any particularly interesting features of the dispute resolution system not addressed in any of the previous questions?

The German civil court system is well regarded on an international level. For instance, the World Justice Project's Rule of Law Index 2021 ranks Germany third out of 139 countries in the civil justice system. Similarly, Germany has consistently been ranked by the EU as one of the top EU countries in terms of promoting and incentivising the use of ADR methods (2019: first place ; 2020: second place ; and 2021: fifth place). In this regard, it should also be noted that the German Institution for Arbitration (DIS) not only offers institutional rules and corresponding services for arbitration, but also for conciliation, mediation, expert determination and adjudication. In addition, DIS has included an

interesting additional feature with the last revision of its arbitration rules: a new annex contains Dispute Management Rules, under which, if both parties agree, DIS will appoint an independent dispute manager who will consult with the parties with a view to helping them agree on the most appropriate dispute resolution mechanism.

Law stated - 25 March 2022

UPDATE AND TRENDS

Recent developments

Are there any proposals for dispute resolution reform? When will any reforms take effect?

In 2021, the legal profession saw various reforms relating to dispute resolution. Notably, certain (albeit narrow) exceptions were introduced to the general ban on contingency fees, and on 1 August 2022, litigation funding by lawyers will be rendered admissible to a limited extent.

In addition, major steps have been taken in the digitalisation of the German judicial system. In particular, since 1 January 2022, lawyers have been required to use a special electronic mailbox for their correspondence with the courts. As a result, lawyers must generally file their submissions in electronic form only. By 2026, courts and public authorities will have to maintain their files electronically. Finally, the pandemic has significantly increased the use of videoconferencing, which has prompted many courts to install modern technical equipment for this purpose.

Law stated - 25 March 2022

Jurisdictions

Australia	Clayton Utz
Austria	OBLIN Attorneys at Law
Belgium	White & Case LLP
Cayman Islands	Campbells
China	Buren NV
Cyprus	AG Erotocritou LLC
Denmark	Lund Elmer Sandager
Ecuador	Paz Horowitz
Egypt	Soliman, Hashish & Partners
Germany	Martens Rechtsanwälte
Greece	Bernitsas Law
Hong Kong	Hill Dickinson LLP
India	Cyril Amarchand Mangaldas
Indonesia	SSEK Legal Consultants
Israel	Lipa Meir & Co
Japan	Anderson Mōri & Tomotsune
Liechtenstein	Marxer & Partner Rechtsanwälte
Luxembourg	Baker McKenzie
Malaysia	SKRINE
Malta	MAMO TCV Advocates
Pakistan	RIAA Barker Gillette
Panama	Patton Moreno & Asvat
Philippines	Ocampo, Manalo, Valdez & Lim Law Firm
Romania	Zamfirescu Racoți Vasile & Partners
Russia	Morgan, Lewis & Bockius LLP

South Korea	Jipyong
Switzerland	Wenger Vieli Ltd
Thailand	Pisut & Partners
United Arab Emirates	Kennedys Law LLP
United Kingdom - England & Wales	Latham & Watkins LLP
USA - California	Ervin Cohen & Jessup LLP
USA - New York	Dewey Pegno & Kramarsky LLP