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New Trends in German Legislation
with regard to Commercial Arbitration

Upon German reunification, the arbitration laws contained in the Code of Civil Procedure (ZPO - Sections 1025 - 1048) became applicable throughout the whole of the country. Thus, Germany is one of few remaining European states where law on arbitration has remained without substantial reform for the past thirty years. Indeed, most sections of the German law on arbitration came into force as long ago as 1877, when the Code of Civil Procedure was established. Only minor changes have taken place. The latest change in 1986 provided that in the case of an arbitral tribunal consisting of 3 arbitrators, if it is not possible to procure the signature of one arbitrator, then this may be waived, as long as the Chairman of the arbitral tribunal makes note of it beneath the award. The present state of affairs is all the more remarkable considering that arbitration has a high reputation with German business for settling both national and international disputes. However, the long-overdue reform of German arbitration law is at present being prepared under the auspices of the Federal Ministry of Justice.

The current reform has been prepared by a Working Group of which I was a member and which submitted its closing report in February 1994. It contains recommendations for the wording of the new law, giving detailed reasons for each specific rule.

Prior to starting work on the reform, three basic questions needed to be settled. First, would it be possible or, indeed, desirable to orientate the new national

arbitration law on the UNCITRAL Model Law. It was agreed that this should be the case. The idea was to make the new German law on arbitration as transparent as possible for foreign parties. It seemed to us indispensable that the German Rules should reflect the Model Law as far as possible almost at first glance.

The second question was whether the German rules should adhere to the Model Law by also restricting themselves to commercial arbitration. We came to the conclusion that the new German law should, on the contrary, apply to all disputes capable of being settled by arbitration. Instrumental in this decision was, among other things, the fact that the criterion "commercial" cannot be used in the same sense in legal rulings based on differing conceptions. The term "commercial", used broadly in the Model Law and open to interpretation as it may be, is not identical with the use of the term under German law. It was therefore determined that the aim should be for uniform rules on arbitration, without, as far as possible, special rulings for domestic disputes. This seemed feasible and the results of our deliberations have since confirmed this view.

The third and last question needing prior consideration was whether the new rules on arbitration should be given the form of a separate law in its own right or whether they should remain part of the Code of Civil Procedure, Volume 10. There were valid reasons for both solutions. The decision was taken to propose including the law on arbitration in a new Volume 10 of the Code of Civil Procedure and for it to resemble the UNCITRAL Model law in structure and scope but to include supplementary rules on the acceptance and enforcement of arbitral awards and on judicial proceedings.

The new German law will adopt the territorial principle on which the Model Law is based, i.e. German procedural law will apply when the place of arbitration is Germany. The parties may however agree otherwise, if, as in the majority of cases, the legal provisions are optional.

In future, the arbitration agreement has definitely to be in the written form; however, this shall be considered as being so if, according to current commercial practices and usages, failure to contradict a business letter of confirmation containing the arbitration clause is taken as consent or if, in a written agreement, reference is made to general conditions of business containing an arbitration clause. Arbitration agreements in documents made out to the bearer or to order, in particular in bills of lading, will be permissible, although with the restriction that simple mention in the bill of lading of the

conditions of the charter party will not be sufficient; it will only be binding for the parties in the legal relationship documented by the bill of lading if express reference is made to the arbitration clause in the charter party.

With only few exceptions, all disputes involving property can be settled by arbitration. Any exceptions - these arise from laws outside the Code of Civil Procedure - should, in the Commission's opinion, be kept to a minimum. The fact that any dispute involving property can be settled by arbitration without, as was previously the case, first having to be seen to be fit for settlement by compromise, greatly widens the scope for settlement by arbitration. It is in future to be extended, for instance, to disputes challenging decisions taken by shareholders, disputes revoking patents or to claims arising from public contracts. The Commission will also recommend repealing rules restricting disputes coming under the anti-trust laws from being settled by arbitration.

Another important question to be settled in the law is the involvement of state courts in arbitration proceedings or in actions connected with arbitration proceedings. Such involvement is in the first place to be found in connection with the imposing of provisional or conservatory measures. State courts can be called upon to approve such measures and to enforce them even in cases where a valid arbitration agreement exists.

The fact that the arbitral tribunal will, upon request of one of the parties, be able to arrange for provisional or conservatory measures to be imposed, which can then be declared enforceable by a state court, is novel to German arbitration law. According to Section 945 of the German Code of Civil Procedure, the party requesting the measures will be liable for compensation if the initiating of such provisional or conservatory measures proves to have been unjustified from the outset or if these measures are subsequently revoked.

The state court can also be approached to provide support in hearing evidence or other judicial acts for which the arbitration tribunal does not have the authority. Rulings will also be included on which state court is competent and on the procedure. Apart from the cases already mentioned, state courts are also competent upon request for decisions regarding the appointment or challenge of arbitrators or experts, the termination of an arbitrator's mandate, the annulment and enforcement of arbitral awards or the annulment of the declaration of enforcement.

Jurisdiction will lie with the Higher Regional Court (Oberlandesgericht) named in the arbitration agreement or in whose area the place of arbitration is situated.

As to the number of arbitrators, the draft provides that should the parties neglect to stipulate their preference, the arbitral tribunal has to consist of 3 arbitrators. A ruling on multi-party arbitration has not been included.

Competence for decisions on the challenge of an arbitrator remains with the state court. The grounds for challenge are laid down in a general clause, whereby the arbitrator is bound to disclose all relevant circumstances to the parties at all stages of the proceedings.

The rules on handling the proceedings also keep fairly strictly to those found in the Model Law. We felt it wise to adopt the exact wording of the Model Law in the majority of cases. The arbitrators' own judgement has been limited somewhat in comparison with the present German law which allowed arbitrators to conduct the proceedings at their own discretion. More detailed rules have been laid down with the advantage of guaranteeing uncomplicated and predictable handling of the proceedings in cases where the parties have neglected to come to a prior agreement on important points of procedure.

It goes without saying that the most important principles of procedure - the right of equal treatment and of due process of law - are included and the ruling that members of the legal profession shall not be excluded as counsel. By the way, of significance for international disputes is the fact that lawyers may be from the country where the arbitration takes place or from abroad. In general, it can be said that mandatory law is of primary importance, then come the parties' mutual arrangements, thirdly optional laws and fourthly the arbitrators' discretion. Apart from relying on ad hoc arrangements, the parties can also agree on specific rules of arbitration, for instance the Rules of Arbitration of the German Institution of Arbitration, the ICC International Rules on Arbitration or the UNCITRAL Arbitration Rules.

Should the parties have neglected to name the venue of the arbitration proceedings, this can be done by the arbitration tribunal. The venue is of significance in several ways, especially in international disputes. In international disputes the applicable procedural law depends upon it, in the new German law whether the award is a domestic or foreign one will be deduced from the venue - this is important for the award's enforcement - and the decision on which local state court is competent also depends on it. According to general practice,

hearings may be held at any suitable place regardless of the choice of place of arbitration.

Detailed rules are laid down for filing the statement of claim and its confirmation, the hearings, the legal consequences should a party fail to act in accordance with the rules, i.e. neglect to reply to the claim or to attend a hearing, as well as for the taking of evidence by experts.

As far as the question of the applicable substantive law is concerned, the draft provides that this is a matter to be agreed by the parties. Should they neglect to do so, the arbitral tribunal must apply the law to which the subject of the dispute is most closely connected. Decisions based on amiable composition are only possible with the express consent of the parties. It is also specified that allowance should be made for current commercial practice.

The arbitration proceedings terminate with the rendering of the award or with agreement between the parties. The form and content of the award must adhere to the usual specifications, as laid down in Art. 31 of the Model Law. As far as the arbitrators' decision on the award is concerned, if one arbitrator refuses to be involved in reaching a decision we decided in favour of letting the remaining arbitrators render and sign the award. Arbitration proceedings terminating in an agreement between the parties is concluded by issuing an award worded in agreement with the parties (award by consent).

While it has of course to be possible to correct obvious errors in an arbitration award, this does not necessarily apply to the right of the arbitral tribunal to interpret certain parts of the award upon request of one of the parties. Nevertheless, in the future German law the German Working Party decided to include the Model Law ruling allowing this, as it helps to prevent requests to set aside an award. However, application must be made within 30 days of receiving the award.

The new German law will include a ruling on the costs. This solution is not taken from the Model Law but is in line with the arbitration rules of various institutions, for instance the UNCITRAL Rules and the ICC Rules of Arbitration. Unless the parties have agreed otherwise, the arbitral tribunal has to decide in its award on the question of who shall bear the costs and, if necessary, also on the level of the costs in a separate award after termination of the arbitration proceedings. As far as the content of the award on costs (that is the division of costs) is concerned, the arbitral tribunal has to decide after due consideration

and taking into account the circumstances of the specific case, in particular the tenor of the award - but again only in default of other agreements by the parties.

Finally, the reasons listed for setting aside an award coincide with those in the Model Law, or in other words those of the 1958 UN Convention. Application to set aside an award must be submitted within 3 months. The setting aside of an award does not make the arbitration agreement null and void.

The draft submitted by the Working Party is now being processed within the Federal Ministry of Justice. However, due to the forthcoming general election in Germany in October 1994, the bill will not be presented to Parliament before its next session. Then, unless the suggestions put forward by the Working Party are subjected unexpectedly to substantial amendment, Germany will have at its disposal an up-to-date law on arbitration, yet one to which we are already widely accustomed due to its close links with the UNCITRAL Model Law.

Bonn, 5 September 1994