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Arbitration in Germany
Possible Impulses for Dispute Resolution Instruments in Developing Countries

Concept paper for GIZ

1. Introduction

Arbitration is an instrument of alternative dispute resolution. Arbitral jurisdiction is established by the parties to a contract agreeing to submit their disputes arising from their contractual relationship to an arbitral tribunal for final assessment and decision ("arbitral award"), thereby opting out of the jurisdiction of state courts. Between the parties, the arbitral award has the legal effects of a final and binding court judgment (see Section 1055 of the German Code of Civil Procedure – "ZPO"). Usually, the agreement ("arbitration agreement") is concluded by an arbitration clause in the contract which refers to all possible future disputes "arising out of or in connection with this contract". An arbitration agreement is also possible after a specific dispute has arisen for the purpose of settling it.

Arbitration agreements are admissible and effective with regard to disputes concerning subject matters which are "arbitrable". These are - according to Section 1030 of the ZPO - pecuniary claims: this broad scope of application covers almost all claims of a civil nature that are directed to money or things and rights of monetary value. Non-pecuniary claims are also arbitrable, provided that the parties are entitled to conclude a settlement regarding the subject-matter of the dispute. Only a few areas of law are excluded from arbitrability (e.g. residential tenancy law, labor law), for which the state claims a decision-making monopoly for overriding considerations.

a. Areas of application of arbitration

Arbitration agreements are most frequently used in commercial contracts, especially in cross-border contracts between contracting parties of different origins, the reason being the steady growth in international trade flows in the course of globalization. In these "international" contracts, it is often not desirable for either party to have to litigate a dispute before the state courts at the domicile of the contracting party, particularly in the latter's national language. Concerns of a state judiciary that is biased in favor of the contracting party or that can be influenced may also play a role. In such cases, agreement on arbitration where the arbitral tribunal meets at a third location and bases its proceedings on a language that is equally understandable to both parties, as a neutral dispute resolution mechanism is generally a solution acceptable to all sides.

Arbitration is also used in corporate disputes and in cases where sensitive business information is in dispute or is bound to be discussed during the litigation proceedings. In other words, arbitration is the dispute mechanism of choice whenever the parties are interested in confidential litigation to protect their internal and business secrets,

which they cannot obtain in litigation proceedings before state courts due to the principle of publicity (cf. Section 169 GVG – German Courts Constitution Act). Arbitration agreements are also frequently found in complex project and construction contracts, the judicial review of which requires special expertise in the event of a dispute.

In Germany, arbitration competes with the state civil justice system, which functions very well in international comparison and is generally able to resolve disputes competently and quickly (see the WJP (World Justice Project) Rule of Law Index 2020, Chapter 7, where Germany ranks 4th in the category "Civil Justice" in the global ranking of the 128 countries surveyed).

b. Other forms of alternative dispute resolution

(1) Mediation

Mediation is an informal but structured process. The mediator assists the conflicting parties in reaching a mutually agreeable dispute resolution agreement ("mediation agreement"). Mediation is a process in which a neutral third party, the mediator, assists with the goal of reaching a mutually acceptable resolution to the conflict. The mediator uses a variety of techniques to help the parties reach such an agreement. However, he or she does not have the decision-making power himself or herself. Since it is a negotiated agreement which, unlike court proceedings, is not limited by the legal subject matter of the dispute, a creative solution involving a wide variety of aspects can be reached which can benefit both parties to the conflict, a so-called win-win solution. Characteristics are voluntariness, confidentiality, neutrality of the mediator: the sole decision-making authority in the dispute resolution is thus in the hands of the conflict parties themselves. This is precisely the charm of mediation as a contribution to strengthening civil society, especially in countries where access to state courts and their impartiality are not guaranteed.

Mediation agreements are, as mentioned, voluntary. Unlike arbitral awards, they therefore lack finality and enforceability. Some modern arbitration rules (including the arbitration rules of the ELArb European-Latin American Arbitration Center in Hamburg, see below) address this problem by offering a combination of arbitration and mediation ("Arb-Med-Arb"). In this case, after the arbitration proceedings have been initiated, a mediation procedure is carried out for the actual resolution of the conflict. Any mediation agreement reached is then recorded as an "arbitral award with agreed wording", which then has, as between the parties, the legal effects of a final and binding court judgment - as already mentioned above.

Mediation is nowadays also an option in state court proceedings, either in the form of court-bound mediation or in the form of court-annexed mediation (outsourced mediation proceedings). In both cases, the mediation agreement is recorded in the form of a court settlement and is thus enforceable.

(2) Conciliation

The conciliation procedure has parallels to the mediation procedure. It is flexible, voluntary and confidential. As a neutral third party, the conciliator supports the parties in their attempt to reach an amicable settlement of the dispute. In contrast to mediation, the conciliator submits a settlement proposal during the conciliation procedure at the request of the parties, which is not binding on them and is regularly based on objective criteria. The focus is primarily on the interests of the parties involved, rather than on legal issues. Similar to the mediation process, the conciliation process guarantees the autonomy of the parties. It is time-saving and cost-effective. The choice of an experienced conciliator can ensure appropriate expertise. It can have a pacifying function. A disadvantage is the non-binding nature of the conciliator's decision.

(3) Arbitral Expert Opinions / Adjudication

In connection with primarily technical issues, it is often contractually agreed that a jointly determined expert or experts will prepare an opinion binding on the parties on certain issues in dispute. This may also be an issue of defining in more detail the rights and obligations of parties under a contract.

A modification is the adjudication procedure, which originated in Great Britain and is used in particular for major projects. The adjudicator, who is usually an expert appointed by the parties, makes a provisionally binding decision within a reasonable period of time, against which legal action can be taken within a certain period of time and which is binding until it is overturned by either the decision of a state court or an arbitral award.

c. Distinction between commercial arbitration and investment arbitration

In addition to commercial arbitration, which is the subject of this paper, there is also investment arbitration, which is distinct from commercial arbitration. This involves lawsuits brought by a foreign private investor against the host state of the investment. Such claims are usually based on bilateral or multilateral investment protection agreements under international law: one example is the Energy Charter, on which the proceedings of Vattenfall AB against the Federal Republic of Germany, pending since 2012, are based. Investment arbitration proceedings may also be commenced on the basis of private investment protection treaties between the investor and the host state.

Investment arbitration has been the subject of criticism for some time, mainly because of alleged procedural intransparency and allegedly unbalanced arbitral awards. Some of these criticisms ("secret justice") have likewise been voiced at commercial arbitration, but wrongly. For it is not without reason that non-publicity is an advantage of commercial arbitration, which the parties choose voluntarily with the arbitration agreement and which applies to the entire arbitration, i.e. not only to the exchange of pleadings and the oral hearing(s), but also to the arbitral award, which may only be published with the consent of the parties. All information relating to the arbitration proceedings therefore remains confidential. This is particularly important for parties of proceedings if trade secrets or other sensitive data are the subject of the dispute.

2. Advantages of (international) arbitration

In addition to the already mentioned neutrality of proceedings conducted at a third location, there are a number of other reasons that contribute to the fact that arbitral awards are generally more readily accepted by the parties than judgments of state courts. This is particularly true for cross-border disputes.

In detail:

a. Flexibility of the arbitration procedure

Arbitration proceedings have the advantage of not being bound by the national statutory procedural rules at the place of arbitration. Rather, private autonomy applies: the parties are largely free to structure the arbitration proceedings, provided that fair conduct of the proceedings is guaranteed. According to Section 1042 of the ZPO, the minimum requirements for due process include the principle of equal treatment, the granting of a fair hearing and the admission of legal representation.

Within the framework thus provided, the parties are free to agree on procedural rules. These can be institutional arbitration rules they deem appropriate. The spectrum is wide: there are globally active arbitration institutions, including for example the ICC Court of Arbitration in Paris, the DIS German Institution of Arbitration and the Swiss Chambers Arbitration Institution. For disputes whose efficient resolution requires special industry know-how and/or special linguistic or cultural knowledge on the part of the arbitration institution and arbitrators, there are special industry arbitration tribunals and special arbitration institutions focusing on specific countries/regions (for more details, see section 4 below). Due to their lower administrative expenditure, proceedings before these latter tribunals are regularly significantly less expensive than those administered by the globally operating arbitration institutions.

If the parties cannot agree on institutional arbitration rules, they have the option of tailoring the procedural rules to their individual dispute according to their own ideas. In this case, however, it is advisable to be guided by the UNCITRAL Model Rules of Arbitration and, if necessary, to supplement them individually. In order to increase the efficiency of the proceedings, the supplementary agreement of "Best Practice Rules" can be considered.

b. Composition of the arbitration court

Another advantage of arbitration is that the parties are not only free to choose the rules of procedure as well as the place and language of the arbitration proceedings, but can also influence the composition of the arbitral tribunal, usually and under most of the institutional arbitration rules without being restricted to a specific group of persons. Thus, in proceedings with an arbitral tribunal consisting of three persons, each of the parties usually nominates one arbitrator, who then agree among themselves on a third arbitrator as chairman. If the arbitration agreement does not specify any particular personal criteria for the selection of the arbitrator (e.g. nationality, legal training), the only indispensable prerequisite for participation in the arbitration proceedings - see Section 1036 Para. 1 of the ZPO - is the impartiality and independence of the arbitrator in addition to his/her legal capacity. The "IBA

Guidelines on Conflict of Interest in International Arbitration", which are available in numerous languages, are regarded as an internationally recognized standard in the sense of a Best Practice Rule: they define circumstances in the presence of which the independence and impartiality of the arbitrator can be considered to be safeguarded or not safeguarded ("Red List", "Orange List" and "Green List").

c. Expertise of the arbitrators

In order to ensure procedural neutrality, in proceedings before state courts the jurisdiction of the judge in charge to make a decision is determined by the schedule of business of the court called upon (guarantee of the lawful judge, Art. 101 Para. 1 Sentence 2 of the German Constitution, Section 16 Sentence 2 of the German Courts Constitution Act). Particularly in the case of complex project contracts with technical issues in dispute which are relevant for the decision, this can lead to the situation that the judge, due to a lack of own knowledge and experience, has no other choice but to base his judgment significantly on the expertise of an expert called in by him - i.e. a third person selected by the court (evidence by experts, §§ 402 to 414 ZPO).

This is different in arbitration proceedings since, by selecting the arbitrator to be appointed by them, the parties can make sure that the arbitral tribunal has own experience and expertise, i.e. can decide on the basis of its own knowledge.

d. Worldwide enforceability of arbitral awards

The almost worldwide enforceability of arbitral awards on the basis of the "New York Convention of 1958 on the Recognition and Enforcement of Foreign Arbitral Awards" (New York Convention - NYC) is of great importance for arbitration as an instrument of alternative dispute resolution. Its currently 166 contracting states (as of December 2020) include Germany: the recognition and enforcement of foreign arbitral awards is governed by Section 1061 of the German Code of Civil Procedure (ZPO), which refers to the provisions of the NYC.

As a result, arbitral awards are much more easily enforceable worldwide than state court judgments, which are enforceable in other countries only on the basis of reciprocity or on the basis of international treaties with a much more limited reach than the NYC. These include

- for judgments rendered in the EU Member States, the Regulation (EU) 1215/2012 (“Brussels 1-bis Regulation”), supplemented with respect to Iceland, Norway and Switzerland by the Lugano Convention,

- the 2005 Hague Convention on Choice of Court Agreements (so far - as of December 2020 - only the EU member states (with the exception of Denmark) and the United Kingdom, Mexico, Singapore and Montenegro are parties to this Convention),

- the 2019 Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters (Contracting States are - as of December 2020 - only Uruguay and Ukraine; EU accession is in preparation).

3. Legal sources

a. Book 10 (Sections 1025 to 1066) of the Code of Civil Procedure (ZPO)

The German arbitration law regulated in Book 10 (Sections 1025 to 1066) of the ZPO is based on the UNCITRAL Model Law as an internationally recognized standard, the provisions of which it has largely adopted in its wording without any changes. In accordance with the territorial principle, it applies as "lex loci arbitri" to arbitration proceedings conducted in Germany. It applies as far as questions of mandatory law are concerned (see above on the minimum requirements for arbitral proceedings regulated in Section 1042 ZPO), and also subsidiarily if there are regulatory gaps in the arbitration rules chosen by the parties.

If an action is brought before a German state court concerning a subject matter which is covered by an arbitration agreement, the action must be dismissed as inadmissible (see Section 1032 ZPO) if the defendant raises the arbitration defense in good time before the hearing. This does not apply to cases where the state court finds that the arbitration agreement is null and void, invalid or unenforceable.

b. Arbitration agreement

Section 1031 ZPO stipulates that the arbitration agreement must be in writing. The scope is wide: (almost) any kind of correspondence is sufficient, even by e-mail, provided that the authors are clearly identifiable. Arbitration agreements can further be agreed by effectively incorporating general terms and conditions into a written contract or - as a German commercial custom, see Section 346 of the German Commercial Code ("HGB") - by commercial letter of confirmation, which the other party does not object to in time ("half-written" - in international cases because of Art. II NYC questionable). Arbitration agreements take effect only between the contracting parties and therefore strictly do not bind third parties.

According to the internationally recognized principle of separability, the validity of the contract and of the arbitration agreement contained therein must be assessed separately. Unless the parties have expressly agreed otherwise, the arbitration agreement is governed by the “lex loci arbitri”, which may differ from the law agreed by the parties of the contract for the substantive legal issues. The purpose of the principle of separation is to ensure that an (alleged) invalidity of the contract does not automatically affect the arbitration agreement.

c. Best practice rules

In international arbitration, the agreement of globally accepted Best Practice Rules has become “state of the art” for the purpose of efficient proceedings. One example are the "IBA Rules on the Taking-of-Evidence". They serve to facilitate the determination of the facts: document submission obligations and the admission of written witness statements, as well as the use of verbatim records of the course of the oral proceedings, are examples. Agreements on the maximum duration of proceedings, the maximum volume of pleadings, etc. are also conceivable.

4. Overview of Arbitration in Germany

a. Institutional arbitration

In Germany, with its long tradition of arbitration, there are a large number of arbitration institutions with their own arbitration rules. If the parties to a contract wish any future disputes between them to be administered by one of these institutions and to be resolved in accordance with its arbitration rules, the arbitration agreement must be formulated accordingly and clearly. For this purpose, it is advisable to use the model arbitration clauses which almost all arbitration institutions provide on their websites and in promotional material.

In detail:

(1) DIS - German Institution of Arbitration

The German Institution of Arbitration ("DIS", https://www.disarb.org) is considered to be the most important German arbitration institution, with headquarters in Bonn as well as a branch office in Berlin and an office in Munich. It is constituted as a registered association and not only has arbitration rules that were updated to modern standards in 2018 ("DIS Arbitration Rules 2018"), but also its own procedural rules on mediation, conciliation and adjudication. The DIS mainly administers purely German arbitration proceedings, but has for some time also been increasingly active in proceedings involving foreign parties.

(2) Chambers of Commerce Arbitration Courts

Numerous German Chambers of Industry and Commerce ("IHK") in major German cities have their own arbitration rules, which, however, usually only regulate a few, locally specific topics (e.g. on the place of arbitration, on the competence of the president of the respective chamber for appointing arbitrators, etc.) and otherwise refer to the DIS Arbitration Rules by also leaving the administration of the proceedings to the DIS. These include, for example, the arbitration rules of the IHK Frankfurt/Main, the IHK of Cologne and the IHK for Munich and Upper Bavaria.

The Hamburg Chamber of Commerce takes a different approach. With its “Regulativ des Schiedsgerichts der Handelskammer Hamburg” ("Regulations of the Arbitration Court of the Hamburg Chamber of Commerce"), it has its own independent full set of arbitration rules designed for disputes between merchants and also administers these arbitration proceedings itself.

(3) Arbitration institutions in Hamburg

Due to its tradition as an international trading city and the large number of local arbitration institutions with their own administrative competence, Hamburg is considered the German stronghold of international commercial arbitration. The Hamburg Chamber of Commerce with its technically well-equipped, representative premises offers excellent conditions for the conduct of arbitration proceedings. This is also where the "HIAC - Hamburg International Arbitration Center" is located, where most of the industry arbitration tribunals and bi-regional arbitration institutions listed below are based.

For academic support of international arbitration, there is also the CIDR - Center for International Dispute Resolution located at Bucerius Law School in Hamburg.

I. Industry arbitration tribunals

The following industry arbitration tribunals have their business seats in the HIAC of the Hamburg Chamber of Commerce:

- the Arbitration Court of the German Coffee Federation (https://kaffeeverband.de) with its own arbitration rules, whose proceedings are administered by the Hamburg Chamber of Commerce. This arbitration court has jurisdiction for disputes arising from coffee transactions concluded on the basis of the European Coffee Contract of the European Coffee Federation, with Hamburg designated as the place of arbitration. These proceedings are truly international since generally at least one of the parties is coming from abroad;

- the Arbitration Court of the Association of Grain Traders of the Hamburg Stock Exchange (https://www.vdg-ev.de) and the Arbitration Court of the Association of Wholesale Traders in Oils, Fats and Raw Materials - GROFOR (https://grofor.de). The arbitration rules of these two industry associations provide for two instances as a special feature, i.e. that the parties to arbitration proceedings can appeal to a higher arbitration court against an arbitration award made in the first instance.

Other arbitral institutions located in Hamburg, each with its own office and arbitration rules, are as follows

- the Arbitration Court of the Warenverein der Hamburger Börse e.V. (https://waren-verein.de) and

- the GMAA - German Maritime Arbitration Association (https://gmaa.de) for maritime disputes.

II. Bi-regional arbitration institutions

Two bi-regional arbitration institutions have their seat in Hamburg: the ELArb - European-Latin American Arbitration Center (https://www.elarb.org, hereinafter "ELArb") and the CEAC - Chinese-European Arbitration Center (https://www.ceac-arbitration.com, hereinafter "CEAC"). Both arbitration institutions are located in the HIAC of the Hamburg Chamber of Commerce and administer their arbitration proceedings themselves.

The ELArb has a modern set of arbitration rules, revised in 2018, available in four languages (German, English, Spanish and Portuguese; a French language version is in preparation). It is modeled on the UNCITRAL Model Arbitration Rules and tailored to commercial disputes between European

and Latin American parties. The ELArb Arbitration Rules contain numerous innovative provisions, including the Arb-Med-Arb Rule mentioned above which combines the advantages of different dispute resolution methods (mediation and arbitration) in a meaningful way.

CEAC follows a similar approach with its CEAC Arbitration Rules, which are tailored to the resolution of disputes in European-Chinese commercial transactions.

b. Ad Hoc Arbitration

If an arbitration agreement is reached after a specific dispute has arisen for the purpose of settling it ("ad hoc"), it is advisable that the parties also agree on institutional arbitration rules. Otherwise, they or - after its constitution - the arbitral tribunal must administer the arbitration proceedings themselves. The statutory provisions of the 10th book of the ZPO then apply to the proceedings. Alternatively, the UNCITRAL Model Rules of Arbitration can be used as an internationally recognized standard to regulate the course of the proceedings.

ANNEX

Some thoughts in keywords on:

Which experiences of German arbitration can be transferred to certain Reform Partnership Countries of the GIZ in Africa?

- Reform Partnership Countries herein considered are Ethiopia, Ghana, Ivory Coast, Morocco, Senegal, Tunisia.

- All aforementioned Reform Partnership Countries are contracting states to the New York Convention (NYC) of 1958.

- So far (December 2020) only Tunisia has adapted the UNCITRAL Model Law as a model for its national arbitration law.

- Côte d'Ivoire and Senegal are OHADA member states where the OHADA Uniform Arbitration Act (Acte Uniforme Relatif Au Droit De L'Arbitrage) applies, with jurisdiction of the CCJA (Cour Commune de Justice et d'Arbitrage) in Abidjan.

- Ethiopia, Ghana and Morocco each have independent national arbitration laws, some of which are considered in need of reform.

- There does not seem to be an established independent arbitration system in any of the countries so far: According to the WJP Rule of Law Index 2020, Chapter 7 in the category "ADR mechanisms are accessible, impartial and effective", all of the aforementioned Reform Partnership countries have only subordinate rankings in the global ranking of the 128 countries surveyed: whereas Ghana is listed best at 33rd place, Côte d'Ivoire follows in 45th place, Morocco in 67th, Senegal in 79th, Ethiopia in 95th and Tunisia in 99th.

- A critical issue in all Reform Partnership Countries seems to be corruption in the civil justice system: according to the WJP Rule of Law Index 2020, Chapter 7 in the category "Civil Justice is free from corruption," the best-listed Ghana is ranked 62nd, followed by Senegal at 64th, Morocco at 93rd, Côte d'Ivoire at 94th, Tunisia at 100th and Ethiopia at 109th.

- The deficits identified in the WJP Rule of Law Index 2020 could suggest a need for action in the sense of strengthening alternative conflict resolution mechanisms in all of the aforementioned Reform Partnership Countries. The experience with alternative dispute resolution instruments – in particular with arbitration - in Germany could serve as a model for improvement.

Excursus: Investment Arbitration

- There exists criticism by several (especially Latin American: Bolivia, Ecuador, Venezuela) states towards the World Bank's ICSID investment arbitration which include, in particular, alleged lack of transparency and unbalanced, investor-friendly arbitral awards.

- With the exception of Côte d'Ivoire, all aforementioned Reform Partnership Countries are members of the ICSID Convention.

- There exists OHADA investment arbitration based on the "Acte Uniforme Relatif Au Droit De L'Arbitrage 2018", with jurisdiction of the CCJA.