

**White Paper**  
**of the Federal Ministry of Justice**  
**on the Modernization of German Arbitration Law**

**18 April 2023**

**I. Objective of the Reform**

In addition to a modern and effective civil justice system, Germany also needs highly developed forms of alternative dispute resolution to remain a strong legal location. Part of alternative dispute resolution is commercial arbitration, which is of central importance especially for economic actors. The existing German arbitration law is highly esteemed nationally and internationally. 25 years after its comprehensive revision, it is nevertheless necessary to adapt this area of law in detail to today's needs in order to increase its efficiency and further strengthen Germany's attractiveness as a location for arbitration.

**II. Development Lines in Arbitration Law**

German arbitration law, which is governed by the 10th Book of the German Code of Civil Procedure (ZPO), was last comprehensively reformed by the Arbitration Reform Act of 22 December 1997.<sup>1</sup> It is largely based on the Model Law on International Commercial Arbitration of 1985 (UNCITRAL Model Law)<sup>2</sup> which has been developed by the United Nations Commission on International Trade Law (UNCITRAL). Since the enactment of this law, a number of developments have been observed in the field of national and international commercial arbitration, among others

- the revision of the UNCITRAL Model Law of 2006,
- the legal reforms in Germany's adjacent countries (e.g., France, Austria and Switzerland), which were all based on the premise of modernizing the respective national arbitration law and strengthening it in the competition for the most attractive arbitration location,

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<sup>1</sup> BGBl. I S. 3224.

<sup>2</sup> UNCITRAL Model Law on International Commercial Arbitration 1985 with amendments as adopted in 2006 ([https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-09955\\_e\\_ebook.pdf](https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-09955_e_ebook.pdf)).

- the differentiated revisions of the arbitration rules of many authoritative arbitration institutions,
- the advancing digitalization of procedural law, and
- the practical experience gained from the handling by the courts of the recast of sec. 1025 et seq. ZPO.

The provisions of the 10th Book of the German Code of Civil Procedure (ZPO) have largely proven their reliability, even taking into account these developments, which is why there is no reason for a fundamental re-evaluation of German arbitration law. The aforementioned developments have, however, revealed a need for selective further developments and innovations in German arbitration law, which are to be taken up in a draft for a modernization law.

### **III. Key Points of the Reform**

In preparing a draft law to modernize German arbitration law, we intend to take the following twelve key points as a basis:

1. In **commercial transactions**, we want to allow the **conclusion of form-free arbitration agreements** and in this respect implement Option II of Article 7 of the UNCITRAL Model Law (2006). In this way, we can restore the German legal situation that existed until 31 December 1997 (sec. 1027(2) ZPO in its old version) without deviating from the UNCITRAL Model Law. At the same time, we eliminate doubts about concluding arbitration agreements electronically and make oral arbitration agreements possible again in commercial transactions. We want to preserve the proven high level of protection for consumer arbitration agreements unchanged.
2. In **multi-party arbitration proceedings**, we want to introduce a provision for the **appointment of arbitrators** if the parties have not agreed on any other procedure for the appointment of the arbitral tribunal. At the same time, we want to create a dispositive **procedure for the judicial substitution of arbitrators in cases where** several parties on one side of the proceedings have been unable to agree on the appointment of an arbitrator. This will make German arbitration law particularly capable of dealing with the increasing number of multiparty arbitrations.

3. If an arbitral tribunal declares as a **preliminary question** that it has **no jurisdiction**, each party to the arbitration can request **judicial review of this arbitral decision** (sec. 1040(3)(2) ZPO). If the arbitral tribunal issues a negative decision on jurisdiction, on the other hand, there is as of now no possibility of judicial annulment of this decision on the grounds that the arbitral tribunal does have jurisdiction. We want to eliminate this **unequal treatment** of positive and negative **arbitral decisions on jurisdiction** and also make it possible for negative arbitral decisions on jurisdiction to be **set aside by the courts**.
4. Following the good practical experience of recent years, we also want to ensure by law that **oral proceedings** before arbitral tribunals can be conducted by means of simultaneous **video and audio transmission ("video conference")**, unless the parties have agreed otherwise. It should also be possible for oral proceedings conducted by video conference to be recorded. With this step, we are strengthening the digitization of procedural law.
5. Various institutional arbitration rules already provide for the publication of arbitral awards. We want to build on this development and legally permit the arbitral tribunal to publish arbitral **awards** if the **parties** agree. In this way, we will increase **transparency in arbitration proceedings**, promote the **further development of the law** and enable the professional public to better access high-quality arbitral case law.
6. The **English language** is the "**lingua franca**" of international arbitration. For this reason, we want to create the legal conditions to ensure that, in the case of applications for a declaration of enforceability or for the setting aside of arbitral awards, both the **award** itself and the **documents** from the arbitral proceedings that are relevant to the respective court proceedings can also be **submitted in English**.

It shall also be possible to submit in English documents from the arbitration proceedings which are of importance for a judicial taking of evidence or for the performance of other judicial acts **pursuant to sec. 1050 ZPO**. With this measure we increase the speed of corresponding proceedings and save the parties the cost of producing elaborate translations if the court sees no need for them.

7. We want to make it legally possible for those states (*Bundesländer*) that introduce **Commercial Courts** to declare these special panels of the higher regional courts to have jurisdiction for **applications for a declaration of enforceability or for the setting aside of arbitral awards**, even without an express agreement between the parties. In this way,

we will make the special competence of these panels in complex commercial disputes available for arbitration.

We also want to create the legal conditions for conducting these proceedings before the **Commercial Courts entirely in English with** the consent of the parties. Due to the overriding importance of the English language in international arbitration, we are accentuating the **cosmopolitan nature of Germany as an arbitration location** in this manner.

8. To further **strengthen the integrity of arbitration proceedings**, we want to introduce an extraordinary legal remedy for the elimination of **final domestic arbitral awards**. This remedy is intended to intervene if the arbitral award suffers from **such significant defects that an action for restitution** (sec. 580 ZPO) would be admissible against a state court judgment under comparable circumstances. This would, for example, facilitate the elimination of final arbitral awards obtained by bribery or perversion of justice and underline the rule of law of arbitral dispute resolution.
9. If an arbitral tribunal orders **measures of interim relief**, we want to make it possible for the **court to grant leave of enforcement** of these measures in **Germany** even if the **place of arbitration** is abroad. In this way, we strengthen the **marketability of decisions** in arbitral interim relief. We will enable courts to make the admission of enforcement dependent on the provision of a **security deposit**.
10. In order to strengthen procedural economy, we want to provide by law that, in the case of **applications** for a declaratory judgment on the admissibility or inadmissibility of arbitration proceedings **pursuant to sec. 1032(2) ZPO**, the court can, at the same time as deciding on the application for a declaratory judgment application, also decide on the **existence or validity of the arbitration agreement**. This clarifies that the decision on the existence of the arbitration agreement in these proceedings also becomes *res judicata*.
11. We want to clarify that in cases in which a **court rejects an application for a declaration of enforceability of an arbitral award and sets aside such award** (sec. 1060(2)(1) ZPO), the court may, on the one hand, in appropriate cases, **remit the case to the arbitral tribunal** upon request of a party (sec. 1059(4) ZPO). On the other hand, the setting aside of the arbitral award has, in case of doubt, the consequence that the **arbitration agreement** becoming operative again with respect to the subject-matter of the dispute (sec. 1059(5)

ZPO). In this way, we strengthen the concurrence of annulment and enforcement proceedings.

12. We want to expressly **limit** the special powers of **the presiding judge of a civil senate** to make certain orders without first hearing the opposing party in the proceedings (sec. 1063(3)(1) ZPO) to **orders in urgent cases**.

#### IV. Other Possible Reform Items

In the **course of drafting the bill**, we also intend to conduct an **open-ended review of the** following issues:

1. Some institutional arbitration rules have a so-called **emergency arbitrator** who can take interim measures before an arbitral tribunal is constituted. We want to **examine** whether an emergency arbitrator should **also be anchored in the German ZPO**. Part of this examination will be whether **emergency arbitrator measures with a foreign place of arbitration** should also be admitted for execution by the courts in Germany, if this is secured by the rule of law.
2. The ICC Dispute Resolution Statistics<sup>3</sup> record for 2020 that in 16 percent of the proceedings administered by the ICC International Court of Arbitration and the ICC International Centre for ADR, a **dissenting opinion**, i.e. a special vote by an arbitrator, was issued. Against this background, we want to **examine** whether a statutory provision on the **admissibility of special votes** should be integrated into **German arbitration law in order to ensure that arbitral awards containing special votes are not subject** to judicial **annulment** in Germany for this reason alone. A position on the admissibility of special votes would **not be a fundamental innovation**, but would tie in with the Federal Government's draft bill for the Arbitration Reform Act of 1997. Even there, the *travaux préparatoires* assumed the admissibility of such votes.<sup>4</sup> This could now be clarified by law due to lingering doubts.
3. We want to **examine** the extent to which, in addition to the possibility already available under sec. 1062(5)(2) ZPO to agree on the jurisdiction of a higher regional court across state borders, there is a **need on the part of the states** to also establish **joint panels of higher regional courts in arbitration matters** across state borders. This could promote the further

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<sup>3</sup> International Chamber of Commerce (ICC) Dispute Resolution Statistics 2020 (<https://iccwbo.org/publication/icc-dispute-resolution-statistics-2020/>).

<sup>4</sup> Bundestagsdrucksache 13/5274, p. 56.

specialization of certain senates on arbitration law issues and thus ensure a highly competent jurisdiction for this subject area.

4. Up to now, the **local courts** have jurisdiction for **assisting in taking evidence** or **performing other judicial acts** which arbitral tribunals are not authorized to perform (sec. 1062(4), 1050 ZPO). We want to **examine** whether this task should **instead** be transferred to the **higher regional courts in** accordance with the basic rule of sec. 1062(1) ZPO, which would thus have jurisdiction over almost all original arbitration disputes.