

KLUWER LAW INTERNATIONAL

Arbitration in Germany

The Model Law in Practice

Karl-Heinz Böckstiegel
Stefan Michael Kröll
Patricia Nacimiento (eds)



Wolters Kluwer

Law & Business

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AUSTIN BOSTON CHICAGO NEW YORK THE NETHERLANDS

ISBN 978-90-411-2718-1

Published by:

Kluwer Law International
PO Box 316
2400 AH Alphen aan den Rijn
The Netherlands
www.kluwerlaw.com

Sold and distributed in North, Central and South America by:

Aspen Publishers, Inc.
7201 McKinney Circle
Frederick, MD 21704
United States of America

Sold and distributed in all other countries by:

Turpin Distribution Services Ltd.
Stratton Business Park
Pegasus Drive
Biggleswade
Bedfordshire SG18 8TQ
United Kingdom

Printed on acid-free paper.

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Arbitration in Germany

The Model Law in Practice

Foreword

Coming from Germany myself, it was a pleasure for me to see that, during my time as Secretary of the United Nations Commission for International Trade Law (UNCITRAL), in 1998 Germany adopted the UNCITRAL Model Law on Commercial Arbitration.

The Model Law had been the result of years of difficult negotiations involving representatives both of industrialized and developing countries in order to present to states all over the world a model for a modern law taking into account the growth and development of commercial arbitration as the preferred method of dispute settlement in international trade and investment. As is well known, by now the Model Law has been introduced in a great number of industrialized and developing countries.

Though German commerce and industry are major users of both domestic and international arbitration and Germany has a highly developed law of civil procedure, the legal and the business community agreed that its arbitration law which was and is contained in the 10th book of its Code of Civil Procedure needed a modernisation. Comparable other industrialized countries, particularly France, England and Switzerland, had already modernized their arbitration laws though not by accepting the UNCITRAL Model. When, at the initiative of the German Institution of Arbitration (DIS), the Commission formed by the German Federal Ministry of Justice started its work on a new arbitration law, two major policy decisions were agreed early: 1. Germany would accept the UNCITRAL Model Law literally and with as few modifications as possible in order to assure transparency for the non-German users of the law to whom the UNCITRAL Model was well known throughout the world. 2. The law would be

applicable both to domestic and to international arbitration in Germany to avoid the well known difficulties arising from the distinction between these two. The result is that, now, Germany has one of the most advanced arbitration laws worldwide which is easily understandable and usable for foreign readers and practitioners.

The present publication closes a gap by providing the first full and detailed commentary in the English language on the modern German arbitration law. A commentary is also provided on the Arbitration Rules of the German Institution of Arbitration (DIS) which are the most frequently used arbitration rules in Germany and are available also to foreign parties both for national and international arbitration. Since the book is edited and authored by the leading arbitration practitioners and academics in the country, it provides to the foreign reader and user a reliable information and tool thereby expanding the transparency to the international public even if they are not familiar with the German language.

I have no doubt that this book will be found to be very useful indeed for the practical users of arbitration as well as for the academic community interested in the field. This is not limited to users which are either involved in arbitration proceedings in Germany or want to enforce a foreign award in Germany. Due to the nearly literal adoption of the Model Law in Germany, the book can also constitute a work of reference for users engaged in arbitral proceedings or arbitration related court proceedings in other Model Law countries.

Prof. Dr. Gerold Herrmann

President, International Council for Commercial Arbitration (ICCA)

Foreword

I am proud to have been asked to write a foreword for this important study of German arbitration law under the Model Law. This book is particularly timely after the initial years of development of the law since the Model Law became effective in 1998.

While Germany is of course a civil law country, the Model Law presents a blending of the common law and civil law traditions. First, the provisions of the law itself include elements of both traditions. Second, and most importantly, the Model Law offers all countries that have adopted it – common law and civil law alike – the opportunity to use a common, international system of precedent in applying its terms. With more than 50 jurisdictions having adopted the Model Law, each has the opportunity to learn from the other. That was the purpose of the book I wrote a few years ago with Henri Alvarez and Neil Kaplan: ‘Model Law Decisions’. In the book, we compiled court decisions from the countries that had then adopted the Model Law and organized them by article. In that way, a court or counsel in any Model Law country may refer to the interpretation and application of that article in other countries. We hope that the book has aided the Model Law’s goal of harmonization.

Germany’s adoption of the Model Law will play a significant role in the development of the Model Law internationally. As a sophisticated legal system in a country with broad international reach, Germany’s courts will have to consider many issues arising under the Model Law. Their decisions will benefit courts and practitioners everywhere. This is particularly true because Germany adopted the Model Law without significant change and to apply to both domestic and international disputes.

This book will accelerate that learning and development process. Written by leading German lawyers and scholars, the book discusses in detail the many issues that can arise under the Model Law in a clear and sensible manner. It will be an invaluable source for understanding the Model Law, not just in the German context but anywhere that the Model Law has application.

David W. Rivkin

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Preface

Germany has a long tradition of commercial arbitration and as the figures of international arbitration institutions show, the German business community is one of the primary users of arbitration. The original German Arbitration Act contained in the 10th book of the Code of Civil Procedure 1877 was probably one of the arbitration friendliest pieces of legislation at the time and allowed for a considerable amount of party autonomy. However, its few and open rules provided only limited direct guidance to users and made it very difficult for them to inform themselves about the German law on arbitration by relying on the wording of the Act. That was particularly true for foreign users, who did not speak German and therefore could not rely on one of the very good commentaries in German.

The situation has improved considerably with the largely literal adoption by Germany of the UNCITRAL Model Law as the national arbitration law for both international as well as domestic arbitration. Since then, Germany is one of the most reliable contributors to the Clout Database of UNCITRAL and numerous German decisions have been published as abstracts or as full translations in English. Irrespective of these improvements, there is still no comprehensive book on Arbitration in Germany in English containing a commentary on the German arbitration law as well as the rules of the leading institutions in Germany. That is probably one of the reasons why Germany despite its efficient and supportive court system and its good infrastructure has attracted less international arbitrations than countries such as e.g. Switzerland or Sweden, where the law is also easily accessible to foreign practitioners due to the existing English commentaries.

In addition, foreign parties who intend to enforce their awards in Germany or seek the support of German courts in favour of foreign proceedings had difficulties to familiarize themselves with the German law.

Purpose and Structure of the Commentary

This commentary provides a comprehensive analysis of German arbitration law. Written by experienced authors practicing arbitration as attorneys, in-house counsel, academics and judges, it furnishes insights from and for all legal sectors where arbitration plays a role.

Part I contains a general overview of the practice of arbitration in Germany with cross references to the detailed analysis in Parts II to IV of this commentary. It serves both as a first and easy reference as well as a guide for finding in depth analysis where required.

Part II is a detailed commentary of each provision of the 10th Book of the ZPO based on both a detailed analysis of the applicable case law and legal writing. It further contains a systematic reference to the UNCITRAL Model Law on International Commercial Arbitration and specifically indicates any specific deviation from or addition to the Model Law.

Part III is the first comprehensive commentary in the English language of the Arbitration Rules of the German Institution of Arbitration (Deutsche Institution für Schiedsgerichtsbarkeit – ‘DIS’), the leading German institution of arbitration. Written by the General Secretary and the Vice General Secretary of the DIS together with leading practitioners of DIS arbitrations, it ensures a profound insight into the practice of DIS arbitrations.

To complete the comprehensive analysis of arbitration as practised in Germany, the commentary concludes with the specific issues analysed in Part IV. These are either a specific branch where arbitration plays a particular role or fields of the law that generate specific problems in relation to arbitration. Part IV reviews the specific case law and legal writing related to the relevant branch or sector of law in addition and completion of Part II.

The primary intention of this commentary is to provide comprehensive guidance to all parties either planning to arbitrate in Germany or which are already involved in arbitral proceedings or arbitration related court proceedings in Germany. In addition, it may serve as a reference for parties involved in such proceedings in other countries which have adopted the Model Law or have submitted the recognition and enforcement of foreign awards to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention 1958). The German arbitration law is to a large extent a literal

adoption of the Model Law. Consequently, the solutions adopted in Germany may also be relevant in other Model Law countries, not only those which traditionally have close ties to the legal developments in Germany, such as Austria, Japan or Turkey but also others like Singapore or Canada where courts and parties have relied on German decisions in their reasoning. The same applies for the New York Convention 1958, for which German law provides a rich jurisprudence.

Acknowledgments

The editors wish to express their grateful thanks to Constanze Tomé and Christian Probst, LL.M. (Wellington), for taking on the laborious task of editing this book – a task they accomplished with great diligence and devotion. The editors further gratefully acknowledge the support of Austin Dunne, Angie Raymond and David Holloway who provided the native speaker control of the wording in this book.

Cologne and Frankfurt, September 2007

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List of Abbreviations

| | |
|----------------------|--|
| AAA | American Arbitration Association |
| ADIC | Arbitration Documentation and Information Center e.V. |
| ADR | Alternative Dispute Resolution |
| AG | Amtsgericht (Local Court) |
| AG | Aktiengesellschaft (Stock Corporation) |
| AG | Die Aktiengesellschaft (Journal) |
| AGA | Auslandsgeschäftsabsicherung der Bundesrepublik Deutschland (Foreign Trade and Investment Promotion Scheme) |
| AGB | Allgemeine Geschäftsbedingungen (Standard Terms and Conditions) |
| AHB | Allgemeine Bedingungen für die Haftpflichtversicherung (General Standard Insurance Terms for Liability Insurance) |
| AIDA | Association Internationale de Droit des Assurances |
| AJIL | American Journal of International Law |
| AktG | Aktiengesetz (German Stock Corporation Act) |
| Am. Rev. Int'l Arb. | American Review of International Arbitration |
| Am. U. Int'l L. Rev. | American University International Law Review |