Danish Arbitration Association

Evidence in Danish and International Arbitration

Jan K. Schäfer

21 April 2017, Copenhagen

King & Spalding

Overview

- Arbitration in Germany
- The methodology of juridical decision-making
- Consequences of the methodology for the taking of evidence
- The traditional German approach to evidence
- German arbitral practice adopts international best practices
- Criticism of German users

Arbitration in Germany – Key Facts

- Aspiring international arbitration venue
- Arbitration clauses in M&A contracts are typical, often with a German seat even if a foreign party is involved, post M&A arbitration is key arbitration practice area in Germany
- Gas-pricing arbitration suddenly went strong but quietening now, offshore wind farming provides for many arbitration cases
- In cross-border transactions, ICC arbitration clauses popular with German companies, often no leverage for a German seat
- Some domestic arbitration, notably ad hoc corporate law arbitration, but German courts are competitive
- Strong local arbitration community, including some leading international arbitrators, many law firms have a dedicated arbitration practice, Frankfurt as a hub in Germany

Arbitration in Germany – Legal Regime

- Germany adopted the UNCITRAL Model Law in 1998 with few amendments as a uniform legal regime
- Evaluation of the law under way, no major issues identified, only nice-to-have changes proposed
- Arbitration related applications are handled by the courts of appeal, many with specialized judges
- The courts show a thorough pro-arbitration bias
- In 2015, 108 applications for court support/control during an arbitration and 211 applications for post-award remedies
- Munich and Frankfurt busiest courts for arbitration related applications
- Courts at the seat are competent so parties can chose the court by determining the seat of the arbitration

Arbitration in Germany - DIS

- German Institution of Arbitration (DIS), the leading arbitration institution in Germany, some other providers
- 1998 Arbitration Rules and various ADR rules, rules revision currently under way, 2017 new rules expected
- Some 2016 statistics:
  - 141 new matters
  - 47 foreign parties involved (2 Danish, 3 British, 5 US)
  - 25% of the cases in the English language
  - 9 proceedings with no German party
  - EUR 1 billion in dispute, largest matter EUR 200 million
  - Frankfurt and Hamburg are the most popular seats
- Attorneys are the dominant group of arbitrators

Arbitration in Germany - ICC & Ad hoc

- ICC arbitration in relation to Germany in 2016
  - German companies were the 4th most active users with some 115 German parties involved (554 US users)
  - German arbitrators acted in 72 matters (200 British, 168 US, 145 Swiss and 98 French)
  - Germany was the place of arbitration in 29 ICC cases (peak with 44 ICC cases in 2011), Frankfurt and Munich are the most popular seats in Germany in ICC cases
  - Attorneys are the dominant group of arbitrators
- Ad hoc arbitration in Germany
  - Corporate law disputes
  - Limitations of arbitrability lifted by the courts
  - Many judges and law professors involved

The Methodology of Decision-Making

- Unwritten method that all German lawyers are trained in and applied by German judges for centuries
- Also used by German arbitrators as a tool to analyze a case
- 3-step approach with emphasis on the legal test
  - Check claimant's case for legal theory underlying the requested relief and necessary factual substantiation, on the basis of the claimant's alleged facts
  - Check respondent's case for legal theory underlying the defense and necessary factual substantiation, on the basis of the respondent's alleged facts
  - Check for any need of taking of evidence, namely if a legally relevant fact is disputed between the parties
- No prejudging as the facts presented by each party are assumed to be correct for the analysis

Consequences of the Methodology

- Parties are required to fully factually substantiate their case early on, full statement of claim as opening brief
- Parties need to offer evidence in their submissions (documents, witnesses and experts)
- A judge needs to review the written submissions early on in order to do the 3-step analysis, typically after 2 short rounds of submissions, which is a time consuming task
- Judges take a pro-active role in managing the case, in particular with respect to the taking of evidence
- At an early hearing, a judge typically explains to the parties his analysis, flags critical issues for further elaboration and engages with counsel in a legal discussion
- A judge typically limits the areas for the taking of evidence to the legally relevant and disputed facts

The Traditional Approach – Documents and Witnesses

- Documents are key evidence and exhibited with submissions
- Very limited possibilities of document disclosure, but burden of substantiation can shift by operation of law
- Fact witnesses do not submit written witness statements but parties merely offer witness evidence relating to factual allegations that might likely get disputed
- Offers of evidence in written submissions

  „The Claimant informed the Respondent by phone on 3 May 2012 that the goods were defective.

  Evidence: Witness testimony of Mr. Meyer, Hamburger Straße 1, 60311 Frankfurt am Main

  The Respondent requested a written explanation of the defects, which the Claimant provided on 7 May 2012.

  Evidence: Email from Mr. Meyer to Mr. Mueller dated 7 May 2012"
- The judge determines what witnesses to hear on what subjects

The Traditional Approach - Experts

- The report of a party-appointed expert is considered part of the factual substantiation of the case/defense and is not treated as a means of evidence
- If a party seeks to rely on an expert, it offers expert testimony and asks the court to appoint an expert

  „The goods were defective as they did not meet the contractual specification of the hardness of the steel.

  Evidence: Expert testimony"
- The court will determine whether there is any need for an expert and, if so, select and instruct the expert
- The parties will be able to comment on the expert report and ask questions to the expert at the hearing
- If the expert has not addressed a relevant aspect, the court will instruct the expert to amend the report

German Arbitral Practice Adopts International Best Practices

- Written witness statements are popular, arbitrators routinely request the parties to submit them
- When setting up the procedural timetable, either a party requests a document disclosure phase or arbitrators include such a phase in their draft procedural timetable, guidance is taken by the "IBA Rules on the Taking of Evidence"
- Older German arbitrators with domestic practices tend to be more hesitant to grant document requests than the younger generation of arbitrators provided the party can explain why the documents are needed (i.e. no fishing expeditions)
- Party-appointed experts are more often used than tribunal-appointed experts
- Parties determine what oral evidence is to be taken and cross-examination is used, arbitrators ask questions after the parties

Criticism of German Users

- The international best practices add time and costs to the proceedings as compared to the traditional German approach
- German companies criticize the automatic adoption of international best practices, which were developed to bridge the common law and civil law divide, in intra civil law disputes
- Cynics among in-house counsel say that international arbitration serves the (financial) interests of arbitration counsels and arbitrators at the expense of the users
  - Counsels like to be in control, bill more hours and therefore readily accept international best practices
  - Arbitrators like the international best practices too as they have to work less and therefore maximize their return if paid according to the amount in dispute (e.g. ICC)
- Is it time to reconsider the current approach of international best practices? What can be learned from domestic practices?

Contact Details

King & Spalding LLP
Jan K. Schäfer, LL.M.
Partner
Frankfurt
Email:
jschaefer@kslaw.com
Phone: +49 69 257 811 200