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Ragnar Harbst,[1] Heiko Plassmeier[2] and Jürgen Mark[3]

A. Legislation and rules

A.1 Legislation

In the 2017-2018 edition of this Yearbook, we reported that the German Federal Ministry of Justice and Consumer Protection had tasked a working group with reviewing German arbitration law.[4] Little has been heard about the working group's deliberations and it is thus still unclear whether the working group's findings will ultimately result in any major changes to German arbitration law.

A.2 Institutions, rules and infrastructure

As we had reported in the 2017-2018 edition of this Yearbook, the German Arbitration Institute DIS (formerly German Institution of Arbitration) has carried out a major overhaul of its arbitration rules.[5] The new rules entered into force on 1 March 2018. It is still too early to assess whether the goals of the reform, in particular concerning the efficiency of DIS arbitration proceedings, have been achieved.

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[1] Ragnar Harbst is a partner in the Frankfurt office. He has acted in numerous international arbitration proceedings with a focus on disputes related to construction and infrastructure.

[2] Heiko Plassmeier is a counsel in the Düsseldorf office. He advises and represents clients in domestic and international litigation, as well as in arbitration cases and insolvency matters.

[3] Jürgen Mark is a partner in the Düsseldorf office. He practices litigation and domestic and international arbitration, among others in corporate and post-M&A disputes as well as in major construction projects.

[4] "The Baker McKenzie International Arbitration Yearbook," 2017-2018 edition, p. 121.

[5] "The Baker McKenzie International Arbitration Yearbook," 2017-2018 edition, p. 122 - 124.

B. Cases

B.1 Arbitrability of disputes relating to shareholder resolutions in limited partnerships

In two parallel orders of 6 April 2017,[6] the Federal Supreme Court held that disputes relating to shareholder resolutions in a limited partnership ("KG") are arbitrable under the same conditions as in a limited company ("GmbH"). These "Arbitrability III" decisions follow on from two predecessors:

In its "Arbitrability I" judgment of 29 March 1996,[7] the Federal Supreme Court still had held that disputes over shareholder resolutions in a GmbH were not arbitrable, since the arbitration decisions as to the validity of shareholder resolutions could have an *erga ommnes* effect on shareholders who were not involved in the proceedings, which would prejudice their procedural rights. It was only in the "Arbitrability II" decision of 2009[8] that the Federal Supreme Court abandoned this principle, holding that arbitration proceedings regarding shareholder disputes in a GmbH are permissible if the following minimum requirements are met: (i) all shareholders must have accepted an arbitration agreement in the articles of association or concluded a separate arbitration agreement between them and with the company, (ii) the company's bodies and all shareholders must be informed about the commencement and course of the arbitral proceedings and must thus at least be able to join the proceedings as third parties, (iii) all shareholders must be given an opportunity to participate in the choice and appointment of the arbitrators, unless the arbitrators are chosen by a neutral institution, (iv) all disputes relating to the same shareholder resolutions must be decided by the same tribunal.

[6] File No. I ZB 23/16, SchiedsVZ 2017, 194 with annotation *Bryant*, and I ZB 32/16.

[7] Judgment of 29 March 19996, file no. II ZR 124/95, BGHZ 132, 278 (= NJW 1996, 1753).

[8] Judgment of 6 April 2009, file no. II ZR 255/08, BGHZ 180, 221 (= SchiedsVZ 2009, 233).

In its "Arbitrability III" decision, the Federal Supreme Court now held that disputes relating to shareholder resolutions in limited partnerships are arbitrable on the same premises, "provided that no deviations as compared with corporations are required." Unfortunately, the court did not indicate which circumstances may require deviations. The way to further "arbitrability" decisions concerning limited partnerships thus appears to be paved. Another unresolved question is whether disputes over shareholder resolutions in stock corporations are arbitrable despite the fact that arbitration agreements for such disputes cannot be validly incorporated in the articles of association of a stock corporation, as section 246, paragraph 3 of the Stock Corporation Act provides for exclusive jurisdiction of the state courts and section 23, paragraph 5 of this statute prohibits deviations. Despite these provisions, it is argued that contractual agreements between all shareholders allowing for arbitration are in principle admissible, although such agreements will in practice be limited to small corporations. So far, the Federal Supreme Court has not ruled on this question.

B.2 Standard of review regarding recognition and enforcement of foreign arbitral awards

An investment dispute between the insolvency administrator of a German stock corporation ("W") and the Kingdom of Thailand occupied the German Federal Supreme Court for the second time.[9] We had reported about the first decision of the Federal Supreme Court in the 2013-2014 edition of this Yearbook.[10] The underlying investment dispute relates to a Thai corporation ("D") in which W held shares. The Kingdom of Thailand had granted D a concession for the construction and operation of a motorway. The sole source of revenues for D were toll fees levied for the use of the motorway.

[9] Order of 6 October 2016, File No. I ZB 13/15, published in SchiedsVZ 2018, p. 53.
[10] "The Baker McKenzie International Arbitration Yearbook," 2013-2014 editon, p. 126 - 227.

In the investment arbitration, W had argued that the Kingdom of Thailand had failed to increase the toll appropriately, had built toll-free alternative routes and had temporarily closed the airport to which the motorway led. The arbitral tribunal issued an award ordering the Kingdom of Thailand to pay more than USD 30 million in damages to the insolvency estate, and the insolvency administrator applied for recognition and enforcement of the award before the Court of Appeal of Berlin. The Court of Appeal granted the application and held that the Kingdom of Thailand was not immune from the jurisdiction of the German courts because by submitting to an arbitration agreement in the 2002 BIT between the Federal Republic of Germany and the Kingdom of Thailand, the Kingdom of Thailand had waived its state immunity. On appeal, the Federal Supreme Court referred the case back to the Court of Appeal for determination of the issue of whether the investment in the shares in D was protected by the 2002 BIT.

The Court of Appeal confirmed its previous decision, and the Kingdom of Thailand once again appealed to the Federal Supreme Court. Among others, the Kingdom of Thailand now argued that it was unconscionable for the insolvency administrator to enforce the award because he had sold the share in D and had granted the buyers the right to demand the termination of the investment arbitration, but did not comply with this obligation when the buyers subsequently demanded such termination. The Kingdom of Thailand argued that this breach of an obligation vis-á-vis a third party had rendered the arbitral award unenforceable.

The Federal Supreme Court held that it does not violate German public policy (section 1061 ZPO, article V 2. (b) of the New York Convention) to enforce the award in the given circumstances. The court confirmed that in the interest of international trade, the standard to be applied in connection with foreign awards is the *ordre public international* and not the stricter domestic German *ordre public interne*. Based on this standard, recognition and enforcement of a foreign award in Germany can only be refused “if the arbitral proceedings suffer from a serious deficiency affecting the foundations

of state and economic life." Fraud in the proceedings may be a ground to refuse recognition and enforcement, yet the Federal Supreme Court held that the insolvency administrator's failure to disclose his obligation vis-à-vis the buyers of the share to terminate the arbitration did not amount to fraud. Likewise, the Federal Supreme Court held that the insolvency administrator's refusal to terminate the arbitration in breach of his contractual obligation did not amount to the tort of intentionally causing unconscionable damage which could have been a basis for invoking public policy. The threshold of "intentionally causing unconscionable damage" is only reached where the behavior in question "according to its overall character, which is to be determined by a comprehensive appreciation of content, motivation and purpose, offends against the decency of all those who think equitably and fairly." Without a "particular reprehensibility of his conduct" (that the Federal Supreme Court did not find), the insolvency administrator's breach of a contractual obligation or even a breach of law was held to be insufficient as a basis to vacate a foreign award for breach of public policy.

B.3 Scope of arbitration clause in contract for the supply of goods with respect to cartel damage claims

In 2013, the District Court of Dortmund had requested in the proceedings "Cartel Damage Claims Hydrogen Peroxide SA" ("CDC") a preliminary ruling under article 267 Treaty on the Functioning of the European Union ("TFEU") from the European Court of Justice regarding the question of whether cartel damage claims fall within the scope of arbitration and jurisdiction clauses contained in contracts for the supply of goods if this would have the effect of excluding the jurisdiction of a state court under article 5 (3) and/or article 6 (1) of Regulation (EC) No. 44/2001 (Brussels Regulation) in relation to all defendants and/or all or some of the

claims brought.[11] In its judgment of 21 May 2015,[12] the European Court of Justice held that article 23 (1) of the Brussels Regulation,

> must be interpreted as allowing, in the case of actions for damages for an infringement of article 101 TFEU and article 53 of the Agreement on the European Economic Area … account to be taken of **jurisdiction clauses** contained in contracts for the supply of goods, even if the effect thereof is a derogation from the rules of international jurisdiction provided for in article 5 (3) and/or article 6(1) of that regulation, **provided that those clauses refer to disputes concerning liability incurred as a result of an infringement of competition law**" (emphasis added).

As to the grounds for its decision, the court stated that a company which suffered a loss could not reasonably foresee cartel damage litigation at the time that it agreed to the jurisdiction clause and had no knowledge of the unlawful cartel at that time. The court argued that cartel damage litigation therefore "cannot be regarded as stemming from a contractual relationship. Such a clause would therefore not have validly derogated from the referring court's jurisdiction."

Two and a half years after the decision of the European Court of Justice in the CDC case, the District Court of Dortmund[13] once again had to deal with the question of whether cartel damage claims fall within the scope of an arbitration clause in a contract for sale. The plaintiff, a consortium created for a railway construction project, had entered into two contracts for the laying of rails with the defendant. The defendant was a member of the so-called rail cartel and the plaintiff argued that it had suffered damage due to illegal cartel arrangements to which the defendant was a party. The contracts

[11]Request for a preliminary ruling of 26 June 2013, Case C-352/13, https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62013CN0352&from=DE

[12]Judgment of 21 May 2015, Case C-352/13, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62013CJ0352.

[13]Judgment of 13 September 2017, File No. 8 O 30/16 [Kart], published in NZKart 2017, p. 604.

between the plaintiff and the defendant provided that all disputes arising out of the orders, as well as all disputes arising in connection with these orders or any subsequent orders, should be settled by an arbitral tribunal to the exclusion of the ordinary courts of law. The arbitration clauses did not expressly cover disputes concerning liability incurred as a result of an infringement of competition law.

Relying on the judgment of the European Court of Justice in the CDC case, the plaintiff argued that cartel damage claims fall outside the scope of the arbitration clauses in the contracts since the parties had not foreseen that such cartel damage claims could occur when they had concluded their agreements.

The District Court of Dortmund did not share this view and expressly refused to apply the CDC principles to the case at hand. The court emphasized that cartel damage claims are arbitrable under German law. Furthermore, the court stressed that arbitration clauses have to be interpreted in an "arbitration-friendly manner" under German law. On this basis, the court held that the wording of the arbitration clauses ("disputes arising out of the orders or in connection with the orders") was sufficiently broad to cover tort claims and thus cartel damage claims. With regard to the CDC judgment, the court rejected the argument that cartel damage claims do not fall within the scope of such arbitration clauses because they are not foreseeable when the contracts are concluded. The District Court of Dortmund pointed out that all disputes, whether based on the principles of breach of contract, tort or fraudulent misrepresentation, are not foreseeable when a contract is concluded. For none of these claims, foreseeability is a criterion to determine whether a dispute about such claims fall all within the scope of an arbitration clause. According to the District Court of Dortmund, there is no reason to treat cartel damage claims differently.

The District Court of Dortmund also pointed out that the CDC decision, despite the broad wording of the District Court of Dortmund's request for a preliminary ruling, did not deal with

arbitration clauses. Rather, the CDC decision only covered jurisdiction clauses. The District Court of Dortmund indicated that the reason may have been that the European Court of Justice lacked competence to interpret arbitration clauses since the interpretation of such clauses is a question of domestic, not European law. Consequently, the District Court of Dortmund dismissed the action for lack of jurisdiction as the dispute had to be settled by arbitration.

B.4 Federal Supreme Court sets aside arbitral award following the *Achmea* ruling of the European Court of Justice

By order of 31 October 2018, the Federal Supreme Court set aside an arbitral award between the Dutch insurance company Achmea and the Slovak Republic.[14] The order implemented the European Court of Justice's *Achmea* ruling[15] that put the arbitration world in an uproar.

The Dutch insurance company Achmea had commenced business activities in the Slovak Republic. Following regulatory changes in the Slovak insurance market that adversely affected Achmea's business, Achmea initiated arbitration proceedings against the Slovak Republic. The proceedings were based on the arbitration clause in the bilateral investment treaty between the Slovak Republic and the Netherlands and the place of the arbitration was Frankfurt. When the tribunal rendered an award in favor of Achmea, the Slovak Republic challenged this award before the competent court in Germany. Achmea argued that the award violated EU law so that the tribunal lacked jurisdiction. While the court of first instance dismissed the challenge, the Federal Supreme Court asked the European Court of Justice for a preliminary ruling according to articles 344 and 267 TFEU. By its question, the Federal Supreme Court was asking the

[14]Order of 31 October 2018, File No. I ZB 2/15 (https://openjur.de/u/2115463.html), published in EuZW 2016, p. 512.

[15]Slovak Republic v. Achmea BV, Case C-284/16. (http://curia.europa.eu/juris/celex.jsf?celex=62016CJ0284&lang1=en&type=TXT&ancre), published in EuZW 2018, p. 239.

European Court of Justice whether arbitration clauses in intra-EU bilateral investment treaties are compatible with European law.

In March 2018, the European Court of Justice decided that such arbitration clauses do in fact put at risk the correct application of EU law and therefore are invalid. In its reasoning, the European Court of Justice stated that article 344 TFEU requires that international treaties between EU member states must not put at risk the autonomy of the EU legal system. Given that arbitral tribunals could not make requests for preliminary rulings according to article 267 TFEU to the European Court of Justice, there would no longer be control over the uniform application of EU law.

By way of its order dated 31 October 2018, the Federal Supreme Court has now drawn the consequences and set aside the *Achmea* award.

C. Diversity in International Arbitration

The German Federal Ministry of Justice and Consumer Protection recently announced that regrettably, women are still underrepresented in arbitration.[16] The Ministry, therefore, supports the Pledge of lawyers, arbitrators, company representatives, states, arbitration institutions, academics and others involved in international arbitration that aims to afford to women equal opportunities in arbitration. It also demands that "states, arbitration institutions and national bodies should include a balanced proportion of female candidates in lists of members or lists of potential arbitrators if they have a say in or are able to maintain such lists." Germany has already taken this into account in the last appointment of ICSID arbitrators.

The Ministry drew attention to the Pledge to improve the profile and representation of women in arbitration and posted links to the Pledge[17]

[16] https://www.bmjv.de/DE/Themen/GerichtsverfahrenUndStreitschlichtung/Schiedsgerichtsbarkeit/Schiedsgerichtsbarkeit_node.html (only in German).
[17] http://www.arbitrationpledge.com/take-the-pledge

and to a list of persons[18] who have already taken the Pledge on its website.

[18]https://daks2k3a4ib2z.cloudfront.net/58a4313f62641fda6d995826/5953771dea1ef85b75a1bd28_Signatories-Table.pdf