ARBITRATION IN GERMANY

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1. *Which are the rules regulating arbitration in your country?*
In Germany, arbitration is governed by the Code of Civil Procedure (Zivilprozessordnung; "ZPO"), Book Ten, §§ 1025-1066. These provisions apply both to domestic and international arbitration. In addition, Germany has ratified the relevant international treaties on international arbitration: The New York Convention of 1958 on the Recognition and Enforcement of Foreign Arbitral Awards ("NYC") and the Geneva Convention on the Execution of Foreign Arbitral Awards of 26 June 1927.

2. *In your country, does mandatory arbitration, besides voluntary arbitration, exist (i.e. imposed by mandatory rules of law)?*
In principle, arbitration is based on an agreement voluntarily entered into by the parties. There are, however, some few instances where statutory law provides for dispute resolution by way of arbitration, *e. g.*, § 8 of the law on associations of legal health insurers and substitute insurers of 17 August 1955,[1] or the arbitration institution for the support of traffic accident victims (§ 14, para. 3a of the law on mandatory insurance[2]). Yet the provisions of the ZPO are not applicable to arbitral tribunals instituted by these statutes.

2.1. *In case of negative answer: What prevents the introduction of mandatory arbitration?*

[1] "§ 8 des Gesetzes über die Verbände der gesetzlichen Krankenkassen und Ersatzkassen vom 17.8.1955".
[2] "Schiedsstelle bei der Verkehrsopferhilfe (§ 14 Nr. 3a Pflichtversicherungsgesetz)".

The idea that arbitration is an instrument which is based on a voluntarily taken decision of private parties (including companies) to derogate from state adjudication, and —instead— have a decision of the dispute by private persons, prevents the introduction of mandatory arbitration.

3. *How are arbitrators appointed?*
Pursuant to § 1034 ZPO the parties may determine the number of arbitrators. In the absence of such an agreement, the number of arbitrators is three. It is possible that the arbitrator(s) are already designated in the arbitration agreement, in particular in an arbitration clause. Furthermore, the parties may in principle also freely determine the procedure for the selection of arbitrators. In case of a three-member panel, the parties' arbitration agreement usually provides that each party appoints an arbitrator, and that the two party appointed arbitrators select the chairperson. In the absence of an agreement on the appointment of arbitrators, they are appointed by the state court. This is also true if the two party appointed arbitrators cannot agree on the selection of the chairperson. If a party fails to appoint the arbitrator within one month of receipt of a request to do so from the other party, or if the two arbitrators fail to agree on the third arbitrator within one month of their appointment, the appointment shall be made, upon request of a party, by the court (§ 1035, para. 3, sentence 3 ZPO).

3.1. *With reference to voluntary arbitration, are there limitations as to the appointment of arbitrators?*
According to German law, the parties are completely free to select the arbitrators. The relevant criterion for the selection of arbitrators should be the absence of both personal relations of an arbitrator to the parties and relations to the subject-matter of the dispute at hand. Arbitrators may be natural or legal persons, native citizens or foreigners. German law does not provide for any restrictions in this respect. However, if administrative officers or judges are proposed as arbitrators, there is an obligation to obtain official approval by the superior administrative body. According to § 40 of the German law on judges, a judge may only obtain an approval if he or she is jointly selected by the parties to the arbitration agreement, or if he or she is appointed by an independent institution, always provided that he or she is not involved in the case or could become involved according to the distribution of cases of the court. The precept of impartial administration of justice must also be complied with in arbitration. This means that a party

or persons related to that party cannot be an arbitrator. For instance, an organ or a member of a representative body of a company may not act as arbitrator. Consequently, the following persons may not be arbitrators: directors of a corporation or of an association, the manager of a limited liability company (GmbH). Moreover, the partners of a partnership according to the German Civil Code (BGB) or of a "Offene Handelsgesellschaft" ("OHG") may not be appointed as arbitrators for disputes involving the relevant firm as a party.

3.2. *How is the arbitrators' impartiality guaranteed?*
The independence of arbitrators is guaranteed by the remedy of a challenge (§§ 1036, 1037 ZPO). In order to render the right to file a challenge effective, the German arbitration law explicitly provides for a duty to disclose by the relevant candidate: He or she shall disclose any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence. Following the example of recent developments in arbitration, *e.g.*, the Rules of Ethics for International Arbitrators of the IBA, § 1036(1) ZPO states: "When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. An arbitrator, from the time of his appointment and throughout the arbitral proceedings, shall without delay disclose any such circumstances to the parties unless they have already been informed of them by him".

3.3. *Is arbitration with more than two parties regulated by a specific set of rules?*
The so-called multi-party arbitration is not specifically governed in Germany. According to the prevailing view, it is required that the different parties on one side agree on the selection of a common arbitrator. As a general rule, this usually presupposes that the relevant parties on one side unanimously agree on the selection of an arbitrator since the right to appoint an arbitrator may be characterized as a fundamental right of a party to arbitral proceedings. This right can only be limited if such an intervention can be justified on the basis of the particular circumstances. A limitation of that right is only conceivable if the requirements of a "notwendige Streitgenossenschaft" (necessary joint claimants or defendants) are met: In such a case, the different claimants or defendants are obliged to cooperate and must appoint a common arbitrator. If the fail to do so, the appointment is made by the court.

3.4. *Are there specific rules on the contractual relation between the parties and the arbitrators?*
According to the prevailing view, the contract among the parties and the arbitrator pertains solely to the substantive law and is governed, subject to some modifications, by the rules of the BGB. If a compensation is due, the contract is to be characterized as a contract of employment ("Dienstvertrag"), if no compensation is due, it is characterized as a mandate. In its precedents, the German Reichsgericht repeatedly designated the said contract as a contract *sui generis*; the German BGH endorsed that view.

4.1. *How is the relation between arbitrators and judges regulated? Is there a form of arbitration within the context of a trial whose carrying out is imposed on the parties by the judge they addressed to?*
A German state court does not have the power to refer the parties to arbitration.

4.2. *Are the rules regarding competence and* lis pendens *[applicable to state courts] also applied [in the context of arbitration]?*
Rules regarding competence and lawsuit pendency: According to the prevailing view, a state court cannot take into account *lis pendens* of arbitration proceedings when it is seized with the same matter. However, the objection that the dispute is to be submitted to arbitration (arbitration defence) may be raised. The objection of *lis pendens* might only be applicable if the same matter were brought before a second arbitral tribunal.

4.3. *How is the objection of a binding arbitration agreement characterized? An objection regarding the procedure or the merits?*
The objection that the dispute is to be submitted to arbitration (arbitration defence) is an objection which affects the admissibility of the procedure before a state court. If the arbitration defence is raised by the defendant before a state court, the latter dismisses the claim if the arbitration defence is well-founded.

4.4. *Can translatio judicii (i.e. the shifting) between arbitrators and ordinary judge (and vice versa) be applied?*
A deferral between a state court and an arbitral tribunal is not possible. After a claim is dismissed by a state court on the grounds of an arbitration

defence, the claimant must, if it wants to pursue the claim, bring it before an arbitral tribunal and initiate the procedure to set up the arbitral tribunal.

4.5. *Does lawsuit pendency before the State judge* (lis apud iudicem pendens) *prevent arbitrators from deciding on the controversy?*
If a dispute is pending before a state court, it may nevertheless be brought before an arbitral tribunal. However, arbitral proceedings may not be instituted or continued if there is a final and binding judgment by a state court holding that the dispute at issue may not be submitted to arbitration. Yet up to the point in time when such a judgment is rendered, arbitral proceedings may be conducted in parallel to state court proceedings. There is a danger that the arbitral proceedings are useless if the state court finds later on that it has jurisdiction (and thus rejects the arbitral tribunal's jurisdiction), since an award issued by an arbitral tribunal that lacks jurisdiction may be annulled.

4.6. *Does lawsuit pendency before arbitrators* (lis apud arbitros pendens) *prevent the State judge from deciding on the controversy?*
If a state court is seized after the same action has already been brought before an arbitral tribunal, the conduct of parallel proceedings before the state court may be impeded as a result of the arbitration defence, *i. e.*, the existence of a binding and effective arbitration agreement.

4.7. *Is the suspension of arbitral proceedings taken into consideration while waiting for a decision of a preliminary question by the State judge?*
The stay of arbitration proceedings pending the decision by a state court on a preliminary issue is not explicitly provided for in the statute but is certainly conceivable.

4.8. *Is the suspension of proceedings pending before the State judge taken into consideration while waiting for a decision of a preliminary question by arbitrators?*
It is possible to stay court proceedings pending the decision by an arbitral tribunal: According to § 148 ZPO, a state court may suspend its proceedings pending the decision by another instance, provided that the decision the state court must make depends wholly or in part on the issue of the existence or inexistence of a legal relationship dealt with by that other

instance. The other proceedings may be pendent not only before any other state court but also before an arbitral tribunal.

5. *Which are the forms of an arbitration proceedings?*
Under German law, subject to the mandatory provisions of Book Ten of the ZPO, the parties are free to determine the procedure themselves or by reference to a set of arbitration rules (§ 1042[3] ZPO). Failing an agreement by the parties, and in the absence of specific provisions in Book Ten, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate.

5.1. *With reference to voluntary arbitration, is there an ad hoc arbitration in which the parties' will is limited as to the proceedings' regulation?*
The parties' sole restriction in determining the procedure is that the requirement of equal treatment and the parties' right to be heard must be respected. Furthermore, counsel (attorneys-at-law) may not be excluded from acting as authorised representatives. There are no further restrictions.

5.2. *Which are the arbitrators' powers regarding the collection of evidence?*
The arbitral tribunal is generally empowered to determine the admissibility of taking evidence, take evidence and assess freely such evidence. However, as a private body, it has no coercive powers. Furthermore, the arbitral tribunal may take any evidence which would equally be admissible before a state court, *i.e.* hear witnesses, appoint experts and carry out inspections, etc.

5.3. *Is judicial assistance to arbitrators taken into consideration for purposes of evidence collection?*
According to § 1050 ZPO, the arbitral tribunal (or a party with the consent of the tribunal) may ask for court assistance in taking evidence. This is always possible if the arbitrators are not empowered to take the relevant evidence themselves. The arbitrators are usually obliged to carry out their task independently: To the extent that they can handle a certain task themselves, they cannot have it done by the court. In case of an application for assistance in taking evidence, the state court must examine whether it is admissible. In this context the court must also determine whether there is a valid and effective arbitration agreement. If it finds that the request is admissible, it must execute it "according to its rules on taking evidence or

other judicial acts", *i.e.* strictly according to the ZPO (*see* § 1050 ZPO). Thus the court hears witnesses and experts, uses its coercive power to have witnesses appear before it, decides on the right to refuse to give testimony or on a challenge of expert witnesses, etc.

5.4. *Are intervention and call of third parties admitted and/or regulated in the arbitration proceedings?*
The call of third parties by a party to the proceedings is admissible. It must be made in the form of § 73 ZPO and will have substantive law effects. For instance, it interrupts time-bar. However, the effects of intervention as provided for in the ZPO do not take place, since the effects of an arbitral award may not be extended to uninvolved third parties.

The participation of a new party by means of principal intervention ("Hauptintervention"), substitution of a party or taking over of proceedings ("Prozessübernahme") presupposes the consent of the parties and the arbitral tribunal. Under these conditions the intervening party subjects itself to the arbitration proceedings. However, a third party cannot unilaterally compel its intervention.

5.5. *Can more than one connected arbitration proceedings be unified?*
The third party cannot compel its intervention (*see supra* 5.5.); this even applies to the case where a third party has entered into an arbitration agreement with a party to the relevant proceedings which relates to the same arbitral institution. There is no agreement and no common clause with the other parties involved in the proceedings. Consequently, German law does not allow consolidation, *i. e.* it is not possible to join several proceedings; furthermore, there is no multi-party arbitration on the basis of a joinder of a third party.

Several institutional arbitration rules, *e.g.* § 9 para. 5 of the Arbitration Rules of the German Coffee Association (SchGO DKV) contain a rule which provides for a joinder. Accordingly, the party intending to cause a third party to participate in the proceedings ("Streitverkünder") may bring its claim for damages or warranty against that third party ("Streitverkündeter") in the same proceedings; this may be characterized as a sort of consolidation ("Prozessverbindung") according to § 147 ZPO.

6. *Which is the possible content of arbitrators' measures?*
An arbitral award may in principle have the same contents as a judgment rendered by a state court. The arbitral award may therefore provide that the

claim fails on its merits and must be dismissed, or, within the relief sought by the parties, the award may include an order for an affirmative action by the defendant (usually the payment of a sum of money; "Leistungsurteil"), a declaratory judgment ("assessment award"; "Feststellungsurteil") or specific legal consequences may be ordered ("constitutive award"; "Gestaltungsurteil"). Moreover, the defendant may also be ordered to effect performance against simultaneous receipt of the counter-performance, or only subject to limited liability.

6.1. *Can arbitrators render assessment awards and constitutive awards?*
Arbitrators can render assessment awards and constitutive awards.

6.2. *Can arbitrators deliver summary measures?*
Under German law, an arbitral tribunal may order interim measures of protection (§ 1041 ZPO). Upon request of a party, it may order interim or protective measures which it deems necessary in respect of the subject-matter of the dispute. The statute does not define interim or protective measures. The following types of interim measures are commonly distinguished:

a) *Protective measures*: Their purpose is to prevent factual changes that would undermine the enforceability of the forthcoming award. Such measures are admissible in order to secure the enforceability of any principal claims involving a positive performance, as well as claims to remove specific objects, refrain from doing something, or tolerate a certain behaviour or situation. For example, one may refer to measures which are aimed at conserving an object in dispute, prohibitions to sell or to modify certain objects, the deposition of the object in dispute with a custodian or its sale if the goods sold are perishable. Moreover, protective measures aimed at securing the enforceability of a forthcoming award in an indirect way, *e.g.* by ordering a bank guarantee, are possible.
b) *Interim regulatory or declaratory orders*: Their purpose is to decree, for the time of the proceedings, the status of a disputed legal relationship. As an example, one may refer to the revocation of the power of representation of a partner of a simple partnership. Moreover, such measures include the situation where the applicant requests that the other party be prohibited from calling a bank guarantee.

c) *Orders for provisional/ temporary performance*: Their purpose is to provisionally enforce a relief sought, *i.e.* an order for an affirmative action, an order to remove specific objects, refrain from doing something, or tolerate a certain behaviour or situation. Examples include an order to continue the contractually undertaken work, or a preliminary prohibition to do certain acts, for instance the prohibition to carry out a certain activity during the time of the proceedings.

7.1. *With reference to voluntary arbitration: Upon which criteria is the area of controversies which can be submitted to arbitration determined?*
According to § 1030 ZPO, any claim involving an economic interest ("vermögensrechtlicher Anspruch") can be the subject of an arbitration agreement. An arbitration agreement concerning claims not involving an economic interest has legal effect to the extent that the parties are entitled to conclude a settlement on the issue in dispute. Thus the relevant criteria regarding the admissibility of an arbitration agreement are that of an economic interest (in which case the arbitrability is generally admitted) or, for claims not involving an economic interest, the parties' power to conclude a settlement on the issue in dispute.

7.2. *Is arbitration admitted for controversies whose object consists of rights which cannot be disposed of by the parties?*
As already mentioned, the relevant standard of German law is not whether the parties may dispose of the rights in dispute, but, as regards claims not involving an economic interest, whether the parties have the power to conclude a settlement on the issue in dispute. The reasoning set forth in the German Government's draft bill is convincing: Arbitration shall only be excluded in areas involving special legally protected rights, where the state has decided to reserve any decision on such matters for state courts. Matters on which no settlement may be concluded only involve matrimonial matters, matters involving children, legal incapacitation, and the like.

7.3. *Does the area of controversies which can be submitted to arbitration coincide with the area of disposable rights and/or with the area of controversies which can be transacted?*
See *supra* at Paragraph 7.1. and 7.2.

7.4. *Can the mandatory nature of rules to be applied be a limit to the possibility to submit the controversy to arbitration?*

The mandatory nature of rules is in general no reason to deny the arbitrability of a dispute: In particular, disputes involving antitrust law matters are generally arbitrable although the relevant provisions are mandatory.

An additional example: For actions aiming at nullifying patents or regarding the withdrawal of patents and the concession of mandatory licenses, the patent court is competent according to § 65(1) first sentence of the Patent Law ("Patentgesetz"). Even though it is frequently asserted that as a result of the above provision, arbitration agreements are inadmissible and invalid, disputes involving patents are equally arbitrable without limitation.

Furthermore: A provision providing for mandatory or exclusive jurisdiction of state courts in certain matters does not in and of itself mean that such subject-matters should not be arbitrable. In particular, if a dispute is brought before a state court for which the court is exclusively competent according to the relevant rules of jurisdiction, the arbitrability of such a subject-matter may not automatically be denied.

7.5. *Do controversies which can be submitted to arbitration coincide with controversies which may be subject of an arbitration clause?*
There is no difference between an arbitration agreement in the form of an arbitration clause or in the form of an agreement to arbitrate which is only concluded after the dispute has arisen.

7.6. *What are the subjective limits of validity of arbitration and arbitration clause?*
There are no limits regarding subjective arbitrability.

7.7. *Is an autonomous action admitted in order to verify the validity of the arbitration agreement?*
Under German law, an action for a positive or negative declaration regarding the validity of the arbitration agreement before the state court is permissible: According to § 1032(2) ZPO, prior to the constitution of the arbitral tribunal, an application may be made to the court to determine whether or not arbitration is admissible. Paragraph 3 of that provision is of particular interest: "Where an action or application referred to in subsection 1 or 2 has been brought, arbitral proceedings may nevertheless be commenced or

continued, and an arbitral award may be made, while the issue is pending before the court".

7.8. Is arbitration on issues non-exhausting the object of jurisdictional proceedings admitted? E.g. where arbitrators are demanded to quantify the damages resulting from a certain event, without prejudice to the issue relating to the right for compensation of these damages.

A person which is independent from the parties may be asked to decide only certain elements of a legal relationship, *e.g*. the amount of damages. This procedure is not governed by the arbitration law, and the decision rendered by the expert is not an award in the technical sense but an expert determination: In order to distinguish an expert determination from an arbitration agreement, it is essential to know whether the person in question is only asked to determine a specific element of the decision or if he or she is asked to definitively adjudicate a claim instead of a state court. In the latter case there will be an arbitration agreement, and not an expert determination. The decisive criterion is whether the relevant person has the power to adjudicate the dispute as a whole.

8. *Are there different types of voluntary arbitration?*

The parties are free to select a certain type of arbitral tribunal. They may provide that the proceedings be conducted on an *ad hoc* basis. The parties frequently provide that the arbitral proceedings shall be governed by the arbitration rules of a stock exchange or a similar organisation, an economic association or another association which entertains a permanent or institutional arbitral tribunal. A permanent arbitral tribunal does not necessarily consist of a panel which is already set up. In case of institutional arbitral tribunals, the parties have often the possibility to select arbitrators from a list of arbitrators, or without any restrictions with regard to such a list. The institution regularly has its own arbitration rules. In addition, it also oversees the arbitration proceedings carried out under its rules to a more or less significant extent and thus fulfils administrative functions.

8.1. *Is it possible to distinguish among the different types of arbitration in relation to the nature of the proceedings and/or to the relations between arbitration proceedings and state jurisdictional proceedings and/or to the effects acknowledged to the award and/or to its appeal regulation?*

There is no difference among the different types of arbitration.

8.2. *Is there a contrast between jurisdictional arbitration and contractual arbitration?*
There is only jurisdictional arbitration, no contractual arbitration: un arbitrato irrituale does not exist.

8.3. *Is equity arbitration admitted* (ex aequo et bono)*?*
Yes, arbitration *ex aequo et bono* is permitted, § 1051 Abs. 3 ZPO.

9.1. *Does voluntary arbitration also include settlement or assessment agreements whenever their content are determined by a third party?*
The parties may either provide for an assessment agreement: this is to be distinguished from arbitration proceedings. Alternatively, the parties agree on transaction. Such a transaction may be made in two different ways: Either the third person acts as mediator; in such a case, the result is a settlement by the parties, but not an arbitral award. Otherwise the third person makes a decision; in that case one speaks of an award on agreed terms (award by consent).

9.2. *Does voluntary arbitration also include the joint mandate to settle and the joint mandate to stipulate an assessment agreement?*
There is no joint mandate to transact; one may only speak of a joint mandate to mediate, in which case the parties conclude a mediation agreement, or of a joint mandate to submit a dispute to arbitration, in which case the parties conclude an arbitration agreement. A joint mandate to stipulate an assessment agreement involves an agreement regarding expert determination.

10. *How is a contractual expert report (or arbitral expert report) characterized? Which is its regulation?*
A contractual expert report is always governed by the applicable substantive law. Its regulation is contained in §§ 317 *et seq*. BGB.

11. *Which is the relation between arbitration and conciliation?*
The relation between arbitration and conciliation consists in the following: arbitration is a way of resolving disputes which results in a binding and enforceable decision by the arbitral tribunal. Conciliation means a process, whether referred to by the expression conciliation, mediation or an

expression of similar import, whereby parties request a third person, or a panel of persons, to assist them without the authority to impose a binding decision on the parties in their attempt to reach an amicable settlement of their dispute arising out of or relating to a contract or other legal relationship.[3]

11.1. *Is an attempt to conciliate a necessary step in order to have access to arbitration proceedings?*
An attempt to conciliate the parties is not a necessary step in order to have access to arbitration proceedings. There are, however, institutional arbitration rules which provide that prior to the commencement of arbitral proceedings, the parties must make an attempt to conciliate.

11.2. *Is an attempt to conciliate used as a necessary step of arbitration proceedings and as a condition in order to proceed with the latter?*
An attempt to conciliate is neither used as a necessary step of arbitration proceedings nor as a condition to proceed with the latter. However, it frequently occurs that arbitrators assist the parties in their efforts to arrive at an amicable settlement.

12. *In your country, are there systems of "informal justice" aimed at favouring conciliation-mediation between the parties (Mini-Trial, Summary-Jury trial, Moderated-Settlement, etc.)?*
In Germany there is a comprehensive system of informal justice. In other words, private arbitral tribunals are to be distinguished from the numerous institutions which offer expert determinations, arbitration or mediation service, and which are entertained by banks, insurers, trade associations and the like.

12.1. *Are there forms of alternative justice administered by private or public institutions?*
These forms of alternative justice are only offered by private institutions.

12.2. *Is there a legislative discipline of these forms of alternative justice?*

[3] *Cfr*. Uncitral draft model legislative provisions on international commercial conciliation, article 2 (doc A/CN.9/WG.II/WP.115 at para. 8).

Reference can be made to the newly introduced §§ 15 a EGZPO: Accordingly, a state law can provide that an action may only be brought before a state court after the parties have previously made an attempt to conciliate before the competent state authority (a special body which is established by the administration of justice of the relevant state, a so-called "Gütestelle"). Some states have introduced special laws providing for mandatory, extra-judicial conciliation (*e.g.*, the states of Brandenburg, Hessen).

12.3. *Which is the relation between these forms of alternative justice and the state jurisdiction?*
If a particular state has passed such a law (statute), the relation between this form of alternative justice and state justice is as follows: a claim filed with the state court is inadmissible and dismissed if the conciliation procedure has not previously taken place.

12.4. *Which is the relation between these forms of alternative justice and arbitration?*
For arbitration proceedings, such a preliminary conciliation procedure cannot be prescribed by the law. However, there are several institutional dispute resolution rules which provide for a combined med-arb procedure, *i. e*. a procedure where the parties conduct first mediation proceedings and then arbitral proceedings.

13. *Is arbitration award validity described by utilising expressions such as* "*decision validity*", "*judgment validity*" *or similar ones?*
§ 1055 ZPO provides under the heading "Effect of arbitral award": "The arbitral award has the same effect between the parties as a final and binding court judgment".

14. *In your jurisdiction, are there rules containing the following expressions:* "*decision validity*", "*judgment validity*" *or similar expressions used to describe the validity of contractual deeds (e. g. transaction or assessment agreements)? Which are these rules?*
According to § 704 ZPO, enforcement measures may be taken on the basis of a final judgment which is either *res judicata* or declared preliminarily executable. § 794 ZPO states: "*in addition*, enforcement may take place on the basis of a settlement agreement concluded before a German court or

before a conciliation body which has been set up or recognised by the administration of justice of the competent state".

Moreover, No. 4a provides: "…on the basis of a decision which declares that an arbitral award is executable. On the other hand, an assessment agreement does not have such an effect. It will rather be the basis for an action requesting an order in favour of claimant.

15. *Independently of the expressions utilised, do the effects of awards and those of judgments issued by the State judge actually coincide?*
As already mentioned, § 1055 ZPO provides that the effects of arbitral awards are exactly the same as those of final and binding judgments rendered by state courts.

15.1. *Which are the objective and subjective limits of the arbitration award validity?*
As with state court judgments, the objective *res judicata* effect of awards encompasses claims and counterclaims which have actually been disposed of in the arbitral tribunal's award (§ 322[1] ZPO). For example, if the arbitral tribunal has only decided part of a claim, the *res judicata* effect will equally be limited. Moreover, only the decision itself will have *res judicata* effect, and not also any decisions regarding facts or preliminary legal questions. By the same token, the *res judicata* effect does not extend to defences raised by the defendant except in case of set-off.

According to the terms of the statute, the arbitral award shall only have the effects of a final and binding court judgment "between the parties". However, this wording is too narrow: The limitation of the effects of the award as between the parties only serves the purpose that nobody is excluded from filing an action before the state court against his or her will. In the event that a third party is equally bound by the arbitration agreement, the *res judicata* effect also extends to that third party under the same requirements which are also applicable in case of an extension of the *res judicata* of state court judgments: Viz. the award is effective for and against third parties which have succeeded to the rights and obligations of the original parties with regard to the arbitration agreement, either by means of universal succession or singular succession, in accordance with § 325 ZPO.

15.2. *The consequent effects of the award, both for the parties and third parties, are the same as those of a judgment issued by a judge?*
See Paragraph 15.1.

15.3. *Does an award which is not appealed within the required time limit has the same effects as a final judgment?*
As noted above, the arbitral award has the effects of a final and binding state judgment. Recourse to a court against an arbitral award may be made by an application for setting aside. Such application against the award is an extraordinary legal remedy. If the relevant time limit (3 months in the absence of a contrary agreement by the parties) is expired, the said extraordinary remedy is excluded as well.

15.4. *In the affirmative, even though it is rendered in the absence of an arbitration agreement, or in respect of a controversy which cannot be submitted to arbitration? Even though its measures are contrary to public order?*
If, however, a party intends to have the award enforced, it must first request that it be declared executable. Yet the application that the award be declared executable is to be dismissed if one of the grounds of annulment set forth in § 1059(2) ZPO are found to be existent, namely:

- Lacking arbitrability.
- Violation of the public policy.

Thus those two defects can be examined in any event, even though the time limit for an application for setting aside is expired. By contrast, the question of the existence of a valid and effective arbitration agreement may not be examined in enforcement proceedings.

16. *Which are the effects on arbitration proceedings of the constitutional legitimacy issue regarding a rule that arbitrators have to apply?*
Article 100 of the German Federal Constitution (Basic Law; "Grundgesetz") provides that a court which concludes that a law on whose validity its decision depends is unconstitutional must obtain a decision from the Federal Constitutional Court if the Basic Law is held to be violated. However, this provision only applies to state courts. An arbitral tribunal is not entitled to proceed in such a way. Yet for arbitral tribunals, § 1050 ZPO is

applicable, according to which the arbitral tribunal may request from a court assistance in performance of judicial acts which the arbitral tribunal is not empowered to carry out. Thus the arbitral tribunal could ask the state court to submit the question of constitutionality to the Constitutional Court.

17. *Is a second instance arbitration admitted?*
A second tier arbitration procedure is possible and would have to be based on a respective arbitration agreement concluded by the parties.

18. *How can an arbitration award be appealed?*
Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with § 1059 ZPO. § 1059 ZPO provides for a number of grounds for setting aside which may be raised before the competent state court and which, if they are well-founded, result in the setting aside of the award. Yet the award is not invalid in and of itself if one of the grounds listed in § 1059 ZPO is present. By contrast, an award may not be annulled on the grounds that the decision is wrong on a point of law or fact since the court is bound by the statement of facts of the award and the legal considerations made by the arbitral tribunal. The grounds for setting aside may be raised in connection with an application according to § 1059 ZPO or by way of defence in connection with an application for a declaration of enforceability pursuant to § 1060(2) ZPO. The grounds for setting aside are literally taken from article V NYC; the structure of § 1059(2) also fully corresponds to article V NYC.

Unless the parties have agreed otherwise, an application for setting aside to the court may not be made after three months have elapsed. The Higher Regional Court ("Oberlandesgericht") designated in the arbitration agreement or, failing such designation, the Higher Regional Court in whose district the place of arbitration is situated, is competent for decisions on applications relating to the setting aside (§ 1059 ZPO) or the declaration of enforceability of the award (§ 1060 *et seq*. ZPO). If the place of arbitration is not in Germany, competence lies with the Higher Regional Court ("Oberlandesgericht") where the party opposing the application has his place of business or place of habitual residence, or where assets of that party or the property in dispute or affected by the measure is located, failing which the Berlin Higher Regional Court ("Kammergericht") is competent (§ 1062[2] ZPO).

19. *Are the above forms of "appeal" subject to a previous granting of executive validity to the award or subject to the approval of the award by the State judge?*
In order to file an application for setting aside the granting of executive validity is not required. The period of time to file an application for setting aside commences on the date on which the party making the application had received the award.

20. *Is there a specific regulation for arbitration, whose object is transnational private controversies?*
There is no particular regulation for arbitration whose object is transnational private controversies: Either a domestic or a foreign arbitral award is rendered; the difference between the two awards only depends on the place of arbitration of the arbitral tribunal. Whether or not the subject-matter of the dispute is of a transnational character is irrelevant.

21. *How is the granting of executive validity of awards regulated?*
Awards may only be enforced if the arbitral award has been declared enforcable. Thus special enforcement proceedings must always been carried out. The relevant application is to be made with the competent court which may only refuse it if there is a ground for setting aside. However, grounds for setting aside may not be taken into account if at the time when the application for a declaration of enforceability is served, an application for setting aside based on such grounds has been finally rejected, or if the time limit to file an application to set aside has expired without the party opposing the application for a declaration of enforceability having made an application for setting aside the award. Only in the event of a violation of the award in respect of the arbitrability or the public policy, an application for a declaration of enforceability may also be dismissed *ex officio* after the relevant time limits have expired.

22. *Is there a specific regulation aimed at granting executive validity to foreign awards?*
For the enforcement of arbitral awards it does not matter whether a domestic or foreign award is the object of the enforcement proceedings since the procedure is the same.

23. *Which is the regulation taken into consideration in order to acknowledge and carry out foreign awards?*
No special procedural rules apply to the recognition of a foreign arbitral award: whether a foreign award may be recognised is determined by the NYC (§ 1061(1) ZPO). The compatibility of the foreign award with the NYC is examined by the competent state court as a preliminary question.

24. *Which is the principle applied in order to distinguish between national awards and foreign awards?*
See above Paragraph 22.

25. *How can the same litigation between the same parties pending before a foreign judge affect internal arbitration proceedings?*
See above Paragraph 4.2.

26. *How can a pending foreign arbitration between the same parties, whose object is the same litigation, affect an internal arbitration proceedings?*
The situation of a conflict of several arbitral tribunals should rather be rare. It probably only occurs in relation with permanent arbitral tribunals. In case of ad hoc arbitral tribunals, a second procedure will usually fail on the grounds that the opposing party may resist the constitution of the second arbitral tribunal. Besides, the issue is disputed: Probably the prevailing view is that the objection may be raised that the same matter between the same parties has already been brought before an arbitral tribunal: in this situation, the principle of *lis pendens* has its own significance in arbitration. There are even legal commentators who take the view that *lis alibi pendens* must be taken into account *ex officio* by the arbitral tribunal second seized. However, another differentiating view holds that while two arbitral tribunals are seized, only one of them is actually competent. Accordingly, at least one tribunal would lack jurisdiction. The incompetent tribunal may then also be the arbitral tribunal first seized. Generally speaking, the legal situation is very complicated, on these issues see Wolfgang Bosch, "Rechtskraft und Rechtshängigkeit im Schiedsverfahren", Tübingen 1991, pp. 207 *et seq*.