

International commercial courts for Germany?

This post is also available via the EAPIL blog.

On 25 April 2023 the German Federal Ministry of Justice (*Bundesministerium der Justiz - BMJ*) has published a bill relating to the establishment of (international) commercial courts in Germany. It sets out to strengthen the German civil justice system for (international) commercial disputes and aims to offer parties an attractive package for the conduct of civil proceedings in Germany. At the same time, it is the aim of the bill to improve Germany's position vis-à-vis recognized litigation and arbitration venues - notably London, Amsterdam, Paris and Singapore. Does this mean that foreign courts and international commercial arbitration tribunals will soon face serious competition from German courts?

English-language proceedings in all instances

Proposals to improve the settlement of international commercial disputes before German courts have been discussed for many years. In 2010, 2014, 2018 and 2021, the upper house of the German Federal Parliament (*Bundesrat*) introduced bills to strengthen German courts in (international) commercial disputes. However, while these bills met with little interest and were not even discussed in the lower house of Parliament (*Bundestag*) things look much brighter this time: The coalition agreement of the current Federal Government, in office since 2021, promises to introduce English-speaking special chambers for international commercial disputes. The now published bill of the Federal Ministry of Justice can, therefore, be seen as a first step towards realizing this promise. It heavily builds on the various draft laws of the Bundesrat including a slightly expanded version that was submitted to the Bundestag in 2022.

The bill allows the federal states (*Bundesländer*) to establish special commercial chambers at selected regional courts (*Landgerichte*) which shall, if the parties so wish, conduct the proceedings comprehensively in English. Appeals and complaints against decisions of these chambers shall be heard in English before English-language senates at the higher regional courts (*Oberlandesgerichte*). If the value in dispute exceeds a threshold value of 1 million Euros and if the parties

so wish, these special senates may also hear cases in first instance. Finally, the Federal Supreme Court (*Bundesgerichtshof*) shall be allowed to conduct proceedings in English. Should the bill be adopted - which seems more likely than not in light of the coalition agreement - it will, thus, be possible to conduct English-language proceedings in at least two, maybe even three instances. Compared to the status quo, which limits the use of English to the oral hearing (cf. Section 185(2) of the Court Constitution Act) and the presentation of English-language documents (cf. Section 142(3) of the Code of Civil Procedure) this will be a huge step forward. Nonetheless, it seems unlikely that adoption of the bill will make Germany a much more popular forum for the settlement of international commercial disputes.

Remaining disadvantages vis-à-vis international commercial arbitration

To begin with, the bill - like previous draft laws - is still heavily focused on English as the language of the court. Admittedly, the bill - following the draft law of the Bundesrat of March 2022 - also proposes changes that go beyond the language of the proceedings. For example, the parties are to be given the opportunity to request a verbatim record of the oral proceedings. In addition, business secrets are to be better protected. However, these proposals cannot outweigh the numerous disadvantages of German courts vis-à-vis arbitration. For example, unlike in arbitration, the parties have no influence on the personal composition of the court. As a consequence, they have to live with the fact that their - international - legal dispute is decided exclusively by German (national) judges, who rarely have the degree of specialization that parties find before international arbitration courts. In addition, the digital communication and technical equipment of German courts is far behind what has been standard in arbitration for many years. And finally, one must not forget that there is no uniform legal framework for state judgments that would ensure their uncomplicated worldwide recognition and enforcement.

Weak reputation of German substantive law

However, the bill will also fail to be a resounding success because it ignores the fact that the attractiveness of German courts largely depends on the attractiveness of German law. To be sure, German courts may also apply foreign law. However, their real expertise - and thus their real competitive advantage especially vis-à-vis foreign courts - lies in the application of German law, which,

however, enjoys only a moderate reputation in (international) practice. Among the disadvantages repeatedly cited by practitioners are, on the one hand, the numerous general clauses (e.g. §§ 138, 242 of the German Civil Code), which give the courts a great deal of room for interpretation, and, on the other hand, the strict control of general terms and conditions in B2B transactions. In addition – and irrespective of the quality of its content – German law is also not particularly accessible to foreigners. Laws, decisions and literature are only occasionally available in English (or in official English translation).

Disappointing numbers in Amsterdam, Paris and Singapore

Finally, it is also a look at other countries that have set up international commercial courts in recent years that shows that the adoption of the bill will not make German courts a blockbuster. Although some of these courts are procedurally much closer to international commercial arbitration or to the internationally leading London Commercial Court, their track record is – at least so far – rather disappointing.

This applies first and foremost to the Netherlands Commercial Court (NCC), which began its work in Amsterdam in 2019 and offers much more than German courts will after the adoption and implementation of the bill: full English proceedings both in first and second instance, special rules of procedure inspired by English law on the one hand and international commercial arbitration law on the other, a court building equipped with all technical amenities, and its own internet-based communication platform. The advertising drum has also been sufficiently beaten. And yet, the NCC has not been too popular so far: in fact, only 14 judgments have been rendered in the first four years of its existence (which is significantly less than the 50 to 100 annual cases expected when the court was set up).

The situation in Paris is similar. Here, a new chamber for international commercial matters (*chambre commerciale internationale*) was established at the Cour d'appel in 2018, which hears cases (at least in parts) in English and which applies procedural rules that are inspired by English law and international arbitration. To be sure, the latter cannot complain about a lack of incoming cases. In fact, more than 180 cases have been brought before the new chamber since 2018. However, the majority of these proceedings are due to the objective competence of the Chamber for international arbitration, which is independent of

the intention of the parties. In contrast, it is not known in how many cases the Chamber was independently chosen by the parties. Insiders, however, assume that the numbers are “negligible” and do not exceed the single-digit range.

Finally, the Singapore International Commercial Court (SICC), which was set up in 2015 with similarly great effort and ambitions as the Netherlands Commercial Court, is equally little in demand. Since its establishment, it has been called upon only ten times by the parties themselves. In all other cases in which it has been involved, this has been at the instigation of the Singapore High Court, which can refer international cases to the SICC under certain conditions.

No leading role for German courts in the future

In the light of all this, there is little to suggest that the bill, which is rather cautious in its substance and focuses on the introduction of English as the language of proceedings, will lead to an explosion - or even only to a substantial increase - in international proceedings before German courts. While it will improve - even though only slightly - the framework conditions for the settlement of international disputes, expectations regarding the effect of the bill should not be too high.

Note: Together with Yip Man from Singapore Management University Giesela Rühl is the author of a comparative study on new specialized commercial courts and their role in cross-border litigation. Conducted under the auspices of the International Academy of Comparative Law (IACL) the study will be published with Intersentia in the course of 2023.