Improving the settlement of (international) commercial disputes in Germany

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As reported earlier on this blog, Germany has been discussing for years how the framework conditions for the settlement of (international) commercial disputes can be improved. Triggered by increasing competition from international commercial arbitration as well as the creation of international commercial courts in other countries (as well as Brexit) these discussions have recently yielded a first success: Shortly before the German government coalition collapsed on November 6, the federal legislature adopted the Law on the Strengthening of Germany as a Place to Settle (Commercial) Disputes (Justizstandort-Stärkungsgesetz of 7 October 2024)[1]. The Law will enter into force on 1 April 2025 and amend both the Courts Constitution Act (Gerichtsverfassungsgesetz – GVG) and the Code of Civil Procedure (Zivilprozessodnung – ZPO)[2] with the aim of improving the position of Germany's courts vis-à-vis recognized litigation and arbitration venues – notably London, Amsterdam, Paris and Singapore. Specifically, the new Law brings three innovations.

English as the language of proceedings

The first innovation relates to the language of court proceedings: To attract international disputes to German courts, the new Law allows the German federal states *(Bundesländer)*[3] to establish "commercial chambers" at the level of the regional courts *(Landgerichte)* that will offer to conduct proceedings in English from beginning to end if the parties so wish (cf. § 184a GVG). Before these chambers parties will, therefore, be allowed to file their briefs and all their statements in English, the oral hearings will be held in English and witnesses will be examined in English. In addition, commercial chambers will communicate with the parties in English and write all orders, decisions and the final judgment in English. Compared to the status quo, which limits the use of English to the oral hearing (cf. § 185(2) GVG) and the presentation of English-language documents

(cf. § 142(3) ZPO) this will be a huge step forward.

The new Law, however, does not stop here. In addition to allowing the establishment of (full) English language commercial chambers at the regional court level it requires that federal states ensure that appeals against English-language decisions coming from commercial chambers will also be heard (completely) in English in second instance at the Higher Regional Courts *(Oberlandesgerichte)* (cf. § 184a(1) No. 1 GVG). The new Law also allows the Federal Supreme Court *(Bundesgerichtshof)* to conduct proceedings entirely in English (cf. § 184b(1) GVG). Unfortunately, however, the Federal Supreme Court is not mandated to hear cases in English (even if they started in English). Rather, it will be in the discretion of the Federal Supreme Court to decide on a case-by-case basis (and at the request of the parties) whether it will hold the proceedings in English – or switch to German (cf. § 184b GVG). The latter is, of course, unfortunate, as parties cannot be sure that a case that is filed in English (and heard in English at first and second instance) will also be heard in English by the Federal Supreme Court thus reducing incentives to commence proceedings in English in the first place. But be this as it may: it is to be welcomed that the German federal legislature, after long and heated debates, finally decided to open up the German civil justice system to English as the language of the proceedings.

Specialized "commercial courts" for high-volume commercial disputes

The second innovation that the new Law brings relates to the settlement of high-volume commercial cases (whether international or not). To prevent these cases from going to arbitration (or to get them back into the state court system) the new Law allows the German federal states to establish specialized senates at the Higher Regional Courts. Referred to as "commercial courts" these senates will be distinct from other senates in that they will be allowed to hear (certain) commercial cases in first instance if the parties so wish (cf. § 119b(1) GVG) thus deviating from the general rule that cases have to start either in the local courts (if the value in dispute is below € 5.000,00) or in the regional courts (if the value in dispute is € 5.000,00 or higher). In addition, commercial courts will conduct their proceedings in English (upon application of the parties) and in a more arbitration-style fashion. More specifically, they will hold a case management conference at the beginning of proceedings and prepare a verbatim record of the hearing upon application of the parties (cf. §§ 612, 613 ZPO). Commercial courts will, hence, be able to offer more specialized legal services as well as services

that correspond to the needs and expectations of (international) commercial parties.

It is unfortunate, however, that the German legislature was afraid that the commercial courts would be flooded with (less complex) cases – and, therefore, decided to limit their jurisdiction to disputes with a value of more than € 500.000,00 (cf. § 119b(1) GVG). As a consequence, only parties with a high-volume case will have access to the commercial courts. This is problematic for several reasons: First, it is unclear whether a reference to the value of the dispute is actually able to distinguish complex from less complex cases. Second, any fixed threshold will create unfairness at the margin, as disputes with a value of slightly less than € 500.00,00 will not be allowed to go to the commercial courts. Third, requiring a minimum value can lead to uncertainty because the value of a dispute may not always be clear *ex ante* when the contract is concluded. Fourth, a fixed threshold may create the impression of a two-tier justice system, in which there are "luxury" courts for the rich and "ordinary" courts for the poor. And, finally, there is a risk that the commercial courts will not receive enough cases to build up expertise and thus reputation. Against this background, it would have been better to follow the example of France, Singapore, and London and to open commercial courts for all commercial cases regardless of the amount in dispute. At the very least, the legislature should have set the limit much lower. The Netherlands Commercial Court, for example, can be used for any disputes with a value higher than € 25,000.00.

Better protection of trade secrets

The third innovation, finally, concerns the protection of trade secrets. However, unlike the other innovations the relevant provisions are not limited to certain chambers or senates (to be established by the federal states on the basis of the new Law), but apply to all civil courts and all civil proceedings (cf. § 273a ZPO). They allow the parties to apply for protection of information that qualifies as a trade secret within the meaning of the German Act on the Protection of Trade Secrets (Gesetz zum Schutz von Geschäftsgeheimnissen – GeschGehG). If the court grants the application, all information classified as a trade secret must be kept confidential during and after the proceedings (cf. §§ 16 Abs. 2, 18 GeschGehG). In addition, the court may restrict access to confidential information at the request of a party and exclude the public from the oral hearing (§ 19 GeschGehG). The third innovation, thus, account for the parties' legitimate

interests in protecting their business secrets without unduly restricting the public nature of civil proceedings, which is one of the fundamental pillars of German civil justice. At the same time, it borrows an important feature from arbitration. However, since the new rules are concerned with the protection of trade secrets only, they do not guarantee the confidentiality of the proceedings as such. As a result, the parties cannot request that the fact that there is a court case at all be kept secret.

Success depends on the federal states

Overall, there is no doubt that the new Law is to be welcomed. Despite the criticism that can and must be levelled against some provisions, it will improve the framework for the resolution of high-volume (international) commercial disputes in German courts. However, there are two caveats:

The first caveat has its root in the Law itself. As it places the burden to establish commercial chambers and commercial courts on the federal states, the extent to which it will be possible for civil court proceedings to be conducted entirely in English and the extent to which there will be specialized senates for high-volume commercial disputes will depend on whether the federal states will exercise their powers. In addition, the practical success of the Law will also depend on whether the federal states will make the necessary investments that will allow commercial chambers and commercial courts to strive. For example, they will need to make sure that commercial chambers and commercial courts are staffed with qualified judges who have the necessary professional and linguistic qualifications and ideally also practical experience to settle high-volume (international) commercial disputes. In addition, they will have to ensure that judges have sufficient time to deal with complex (national and international) cases. And, finally, federal states will have to ensure that sufficiently large and technically well-equipped hearing rooms are available for the kind of high-volume disputes that they seek to attract. Should federal states not be willing to make these kinds of investments commercial chambers and commercial courts will most likely be of limited use.

The second caveat concerns the likely success of the new Law with regards to *international* disputes. In fact, even if the federal states implement the new Law in a perfect manner, i.e. even if they establish a sufficient number of commercial chambers and commercial courts and even if they make the investments described above, it seems unlikely that German courts will become sought-after

venues for the settlement of international commercial disputes. This is because the German civil justice system has numerous disadvantages when compared with international commercial arbitration. In addition, the attractiveness of German courts suffers from the moderate reputation and poor accessibility of German substantive law. Both problems will not disappear with the implementation of the new Law.

Against this background, the new Law holds the greatest potential for *national* high-volume commercial disputes. However, it should not be forgotten that these kinds of disputes represent only a small fraction of the disputes that end up before German courts each year. In order to really strengthen Germany as a place to settle dispute, it would, therefore, be necessary to address the problems that these cases are facing. However, while the (now former) Federal Minister of Justice made promising proposals to this effect in recent months, the collapse of the German government coalition in early November makes is unlikely, that these proposals will be adopted any time soon. In the interest of the German civil justice system as a whole, it is, therefore, to be hoped that the proposals will be reintroduced after the general election in early 2025.

[1] Gesetz zur Stärkung des Justizstandortes Deutschland durch Einführung von Commercial Courts und der Gerichtssprache Englisch in die Zivilgerichtsbarkeit (Justizstandort-Stärkungsgesetz) vom 7. Oktober 2024, Bundesgesetzblatt (Federal Law Gazette) 2024 I Nr. 302.

[2] Note that both the translations of the GVG and the ZPO do not yet include the amendments introduced through the new Law discussed in this post.

[3] The German civil justice system divides responsibilities between the federal state *(Bund)* and the 16 federal states *(Bundesländer)*. While the federal state is responsible for adopting unified rules relating to the organization of courts as well as the law of civil procedure (Art. 74 No. 1 of the Basic Law), the federal states are responsible for administering (most) civil courts on a daily basis (Art. 30 of the Basic Law). It is, therefore, the federal states that organize and fund most civil courts, appoint judges, and manage the court infrastructure.