Market Intelligence

DISPUTE RESOLUTION 2021

Global interview panel led by Simon Bushell of Seladore Legal

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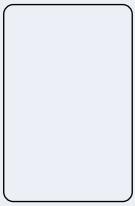

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Dispute Resolution 2021

Germany

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Anna-Gesine Zimmermann specialises in litigation and arbitration. She advises and represents national and international enterprises in civil, mercantile and commercial law disputes. This encompasses both extrajudicial dispute resolution as well as the enforcement and defence of claims before state courts and arbitral tribunals. A further focus of her activities is the drafting of contracts and advising on their implementation, particularly purchase agreements and contracts for works. She also advises clients on matters of distribution law, particularly the defence of compensation claims. She is a member of the German Institution of Arbitration, the DIS40 German Initiative of Young Arbitrators, the Cologne Bar Association and the German Institute for Distribution Law.

1 What are the most popular dispute resolution methods for clients in your jurisdiction? Is there a clear preference for a particular method in commercial disputes? What is the balance between litigation and arbitration? What are the advantages and disadvantages of the most popular dispute resolution methods?

Litigation is still the dominant dispute resolution method in Germany, but there are specific fields in which arbitration is of outstanding importance. This particularly applies in complex international commercial disputes in the corporate sector and where the parties prefer specific knowledge of the deciding body, such as from a specific industry. Arbitration is therefore a common mechanism, for example, in construction disputes or post M&A proceedings.

Over the past few years, state court proceedings with high amounts in dispute have declined. As the state courts have attributed this to competition with arbitration courts, they have started to work against this and strive to become more competitive internationally. Some courts, such as the Frankfurt District Court, have set up 'international chambers of commerce' with English-speaking divisions. The commercial courts are bound to the statutory requirement that the court language is German, which is why pleadings as well as decisions of the courts must be drafted in German. However, oral hearings may be conducted in English and all annexes, such as contract documents or other documents submitted as evidence, may be submitted in English as well. This can save time and considerable costs: English language documents do not need to be translated and English-speaking witnesses can be heard without interpreters. Apart from that, clients who are not proficient in the German language may easily follow the oral hearing.

By the end of 2020, the District Courts of Stuttgart and Mannheim had set up another Commercial Court with a new concept that adapts some of the principles of arbitration. This Commercial Court has jurisdiction over large commercial civil cases, in particular corporate disputes, corporate acquisitions and economically significant disputes in the B2B area with an amount in dispute of at least €2 million. The Commercial Court advertises that it is fast, dynamic and efficient due to, among other things, excellent staffing. Similar to arbitration, the parties are free to limit the process to one instance and exclude any means of appeal. As a state court, the Commercial Court is vested with respective rights. For example, it is entitled to administer oaths and issue subpoenas, such as to summon witnesses or experts who do not appear voluntarily.

State courts have the advantage over arbitration courts in that they are significantly cheaper on average. Court fees incur on the basis of a fee table. Overall,


Vanessa Pickenpack


Anna-Gesine Zimmermann

clients usually perceive the price-performance ratio of state court proceedings as balanced.

On the other side, clients often fear that arbitration proceedings are very expensive. However, they often misjudge that, in arbitration, the costs are limited to one instance and susceptible by agreement of certain parameter, such as the number of arbitrators or the type of institution. The German Arbitration Institution, for example, offers established procedural rules at significantly lower costs than the International Chamber of Commerce (ICC). One advantage of arbitration is that usually the proceedings are conducted efficiently because the tribunal and the parties make use of the opportunity to adapt the process to the requirements of the specific dispute. In addition, the course of the proceedings is relatively foreseeable due to the early agreement of procedural steps and timetables in arbitration. Of course, state courts can also take similar measures, but experience shows that they do so only very rarely to date.

2 Are there any recent trends in the formulation of applicable law clauses and dispute resolution clauses in your jurisdiction? What is contributing to those trends? How is the legal profession in your jurisdiction keeping up with these trends and clients' preferences? What effect has Brexit had on choice of law and jurisdiction clauses?

Our practice in 2020 confirmed the previous year's trend that clients pay more attention to the choice of the applicable law and the dispute resolution method when concluding contracts. A present reason could be the awareness of the great number of disputes related to the covid-19 pandemic, which goes hand-in-hand with tailoring force majeure clauses more specifically to these circumstances. We are also see growing interest in combining judicial and pre-litigation dispute resolution mechanisms, for example, through pre-arbitration or pre-litigation negotiations at various corporate levels. In the M&A area, certain disputes, such as regarding purchase price adjustments, are frequently assigned to experts. Overall, clients increasingly expect law firms to provide comprehensive advice regarding applicable law clauses and dispute resolution mechanisms.

Brexit still plays a minor role when negotiating dispute resolution clauses in our practice. Although the United Kingdom left the European Union in January 2020, the relevant law of the European Union remained applicable until 31 December 2020. The future situation regarding the enforcement and recognition of judgments between the UK and the EU member states is uncertain as the respective EU regulation is no longer applicable to proceedings that commenced after 31 December 2020. This might fuel the trend to opt for arbitration as dispute resolution mechanism.

3 How competitive is the legal market in commercial contentious matters in your jurisdiction? Have there been recent changes affecting disputes lawyers in your jurisdiction? How is the trend towards 'niche' or specialist litigation firms reflected in your jurisdiction?

The market in commercially contentious matters is diverse and offers all types of firms from solo practitioners via boutique firms to full-service companies with specialised departments. The trend towards boutiques in the field of arbitration has continued over the past several years. In 2020, a number of partners from big law firms have gone independent under their own names, often to reduce the potential for conflict when accepting arbitrator mandates. As there is a huge variety in players on the market, it is rather competitive. This further strengthens the need of full-service firms to offer flexible pricing models.

"The trend towards boutiques in the field of arbitration has continued over the past several years."

Following the diesel scandal, data protection violations could become the new subject of mass and class actions. The first General Data Protection Regulation (GDPR) fines against companies have already been imposed and now disputes lawyers are warming up for future data protection litigation cases. New cases that could fill dispute resolution teams' desks might further result from environmental, social and governance (ESG) litigation. Several pieces of legislation, such as the Supply Chain Act, could lead to companies being sued more frequently in the future for violations of ESG standards.

The legal tech scene initially saw a strong boost following the Federal Court of Justice's (FCJ) decision on the business model of the legal tech company LexFox, which is registered as debt collection service provider. LexFox operates an online platform, through which consumers can enforce claims under rental law without incurring any cost risk of their own. The FCJ confirmed that the collection permit includes the right to agree upon success fees or take over court costs. The economic impact of the decision is enormous, as collection service providers such as LexFox are allowed to agree on contingency fees, which is prohibited for the legal profession.

In other ways, however, the legal tech scene suffered setbacks. Class actions of the legal services providers Financialright, with claims of more than 3,000 carriers regarding the truck cartel, and myRight, with claims of diesel vehicle customers, were dismissed by several district courts as not being covered by the collection permit. The courts fear conflicts of interest when claims are bundled and asserted en masse. Additionally, the courts considered a business model that is aimed from the outset at asserting claims in court, and provides for out-of-court assertion only in exceptional cases, to no longer be covered by the collection permit.

4 What have been the most significant recent court cases and litigation topics in your jurisdiction?

Cybersecurity and data protection disputes constitute a key trend over the past several years, but especially in 2020. Increasing digitalisation is accompanied by an increasing number of cyberattacks, leading to service disruptions and disputes over associated damages. As it is only extremely rarely possible to apprehend the actual attackers, the only 'tangible' opponent to a claim is often the company's own managing director on the grounds of negligent failure to provide adequate IT security for the company. More and more companies therefore conclude cyber-insurances covering potential damages.

Among the emerging issues that are primarily the subject of arbitration are disputes related to warranty and indemnity (W&I) insurances securing guarantees, warranties and indemnities under a sale and purchase agreements in M&A transactions. These types of insurance have become increasingly popular over the past few years in the German market to reduce the liability risks resulting from an agreement breach. This has resulted in a need for special advice on W&I insurance during the M&A transaction but also in subsequent disputes concerning policy. In the event of a breach of contract, the buyer raises the claim against the insurance company rather than against the seller. This keeps the relationship between buyer and seller unencumbered and provides the buyer with a solvent debtor. As is common in the field of M&A, disputes over the claim are then usually settled in arbitration courts.

5 What are clients' attitudes towards litigation in your national courts? How do clients perceive the cost, duration and the certainty of the legal process? How does this compare with attitudes to arbitral proceedings in your jurisdiction?

Decisions of German national courts are well accepted. The price–performance ratio is usually considered good, particularly due to the fact that German judges undergo many years of training.

However, the spread of the covid-19 pandemic constituted – and still is – a major challenge for the German judicial system, particularly due to the lack of technical progress. For example, although the German Code of Civil Procedure have provided for the opportunity to conduct oral proceedings by means of video and audio streaming since 2002, courts rarely made use of this option prior to covid-19. As a result, not all courts were equipped with the appropriate hardware and only a few were skilled in conducting hearings in this manner prior to spring 2020. Efforts to close this gap varied from court to court and mainly depended on the financial resources. If possible, most courts quickly acquired the necessary

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"Since the end of 2020, we have seen a noticeable increase in disputes that revolve around covid-19."

equipment and put it into use. Others, however, still lack the financial resources to follow suit. The use of videoconferencing systems is up to the individual judge or chamber. Many judges regularly conduct oral hearings and even evidentiary hearings by means of videoconferencing. Others have reservations and refuse to do so.

As a result, the impact of covid-19 has been varied. Some lawsuits proceed almost unaffected by the pandemic, but, where the equipment, the readiness of judges or, in some cases, the suitability of cases is lacking, other proceedings have been significantly delayed. Many courts have repeatedly cancelled postponed hearings over the past year and often it is not foreseeable when the process will continue after all. This often results in massive dissatisfaction among clients as they have the impression that they are not being heard. Further, the delays result in considerable disadvantages where evidence-taking is necessary and witnesses are to be heard. As a rule, memories of the facts to be proven fade over time. This results in major difficulties for the party being under the burden of evidence.

6 Discuss any notable recent or upcoming reforms or initiatives affecting court proceedings in your jurisdiction.

Since the end of 2020, we have seen a noticeable increase in disputes that revolve around covid-19. Most disputes concern the pandemic-related disruption of contractual relationships and whether the pandemic is a force majeure event justifying termination of the contract or delayed service provision. For example, we advised a number of clients in the events sector right at the start of the pandemic on whether they were entitled to extraordinarily terminate event contracts, travel contracts or accommodation contracts. A number of clients from the events sector found amicable solutions with their contractual partners, such as rescheduling planned events. In other sectors and where permanent contractual relationships were terminated, amicable solutions were more difficult to achieve and very often a dispute about the validity of a termination or, on the contrary, about the invalidity and resulting damage claims was virtually inevitable. These cases will occupy the German legal landscape for some time to come, in particular as the decisions have to be made on a case-by-case basis. The proceedings are likely to be complicated by one or more of the parties involved becoming insolvent during the litigation.

What is going to shape the litigation landscape not only in Germany but across the entire EU is the 'Directive on Representative Actions for the Protection of the Collective Interests of Consumers'. It introduces the possibility of collective redress across EU borders and aims at strengthening the protection of consumers in case of mass damages. According to the directive, consumers have to be free to join any action by either an opt-in or an opt-out mechanism. The latter is subject to the

adoption of the directive by the member state. Under the directive, actions may only be taken by 'qualified entities'. The member state first has to appoint an entity if it complies with specific criteria (ie, it aims to represent the customer's interests and being a non-profit company). However, the road for qualified entities is not hurdle-free, for example, courts or administrative authorities may dismiss evidently unfounded cases. Nevertheless, it goes beyond the scope of current mechanisms. The member states have to implement the directive into their national laws within the next two years.

7 What have been the most significant recent trends in arbitral proceedings in your jurisdiction?

Data protection law is on the rise and does not stop at arbitration. If data is being electronically processed in arbitration proceedings, the GDPR, which as a regulation is directly applicable in all member states of the European Union and the European Economic Area, must be observed by the tribunal. As data controllers, arbitrators are subject to the information obligations of the GDPR. The arbitration institutions such as the German Arbitration Institution and the ICC therefore advise arbitrators to inform the parties at the beginning of proceedings about the use of their data and to explain data protection principles to be complied with. It has become standard for the tribunal to provide the parties with data protection declarations at the very beginning of the arbitration. Nevertheless, numerous questions remain unresolved at this stage, such as whether the controller within the meaning of the GDPR is the arbitrator or their law firm and who is liable in the event of a violation of data protection law. The question may also arise during the proceedings, whether the parties or even their party representatives are entitled to the surrender of certain data against the arbitral tribunal.

Another hot topic is artificial intelligence in arbitration. For example, the recent DIS40 International Online Conference 2021 was titled 'Big Data and Foreseeability of Decision Making in International Arbitration'. The panellists as well as the audience acknowledged that artificial intelligence will play a huge role in national and international dispute resolution in the future. Recently firms like ArbiLex have tried to combine artificial intelligence and predictive analytics in order to assess possible outcomes of arbitral proceedings. Nevertheless, it appears that practitioners are rather sceptical of whether the technology is mature enough to have a chance not only in investment arbitration but also in varied commercial arbitration.

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8 What are the most significant recent developments in arbitration in your jurisdiction?

By the end of 2020, the FCJ had decided on the controversial question of whether the UN Convention on Contracts for the International Sale of Goods (CISG) applies to the validity of arbitration agreements. In line with the prevailing view of arbitration practitioners, the FCJ held that the CISG applies 'at least in cases in which in the absence of compliance with article II of the New York Convention, the most favoured nation principle (article VII New York Convention) requires the application of national substantive law or conflict of laws'. Under German law, the formal validity of the arbitration agreement is subject to the provisions governing the form of the arbitration agreement. If, however, one party refers to a separate document that contains the arbitration agreement, the test of if the arbitration agreement was validly incorporated by reference is governed by German substantive law, including the CISG .

In January 2020, the Higher Regional Court of Frankfurt rendered a much-noticed decision on dissenting opinions. In an *obiter dictum*, the court stated that the

publication of a dissenting opinion in arbitration proceedings governed by German arbitration law violates German public policy and constitutes a ground for annulment of the award. To put this decision into context, one must know that German law imposes a strict preservation of secrecy on the deliberations of judges. The decision shook the arbitration community in Germany as, until then, the majority opinion assumed that dissenting opinions are admissible in arbitration proceedings regardless of the principle of secrecy of deliberations of judges, which were only considered applicable in state court proceedings. One of the reasons for this view is that there is no appeal in arbitral proceedings, which is why there is no danger of an appealing party using the arguments brought forward in the dissenting opinion. Especially in common law jurisdictions, there is no question that a dissenting opinion by a minority arbitrator is permissible. However, arbitrators in proceedings subject to German procedural law should be cautious from now on, as they may be liable for damages if they publish a dissenting opinion.

9 How popular is ADR as an alternative to litigation and arbitration in your jurisdiction? What are the current ADR trends? Do particular commercial sectors prefer or avoid ADR? Why?

In Germany, ADR methods are still rarely used in disputes in the corporate sector. In our experience, the construction industry is one of the few exceptions where ADR is well-established. In particular in large international construction projects with a large number of companies involved, ADR boards are often set up to settle disputes that arise during the project and to prevent the project from coming to a standstill. Even though ADR methods do not provide for directly enforceable decisions, there is usually a high acceptance between the parties involved.

In consumer disputes, there is the possibility of involving 'consumer arbitration boards', which seeks a solution after hearing the parties involved. Participation is voluntary for both parties and free of charge for consumers. This possibility exists in the implementation of the EU Directive 2013/11 (the ADR Directive) of the European Parliament and of the Council of 21 May 2013. The directive requires member states to ensure that consumers have access to out-of-court dispute resolution bodies in the event of disputes with entrepreneurs. There are numerous consumer arbitration boards (eg, for disputes with insurances and airlines), but in case of there being no specialised body, the General Consumer Conciliation Body provides assistance.

"It has become increasingly common for German companies to at least consider litigation and arbitration funding."

10 What is the position in relation to litigation funding in your jurisdiction? Is funding available? Have there been any significant developments in this area in your jurisdiction?

Litigation and arbitration funding has established itself in the German market over the past few years and is becoming increasingly important. Large international financiers now have their own local offices, which they have built up and expanded at considerable speed with hirings, usually from large law firms. In the process, they have developed noticeable focal points, such as arbitration proceedings or antitrust damages proceedings.

At the same time, it has become increasingly common for German companies to at least consider litigation and arbitration funding. We are seeing, more and more, that clients are actively inquiring about financing options – whether at the beginning of a case or during its course. For this reason, we have built up good contacts with funding companies in recent years in order to be able to meet this demand and provide respective advice to our clients, if reasonable or required.

One of the main benefits of third-party funding that is being discussed frequently is that it enables parties to initiate arbitration proceedings and pursue their claims without the risk of overstretching their finances. However, the discussions also revolve around two main concerns: ensuring the impartiality and independence of arbitrators and the necessity of security for costs. It remains to be seen whether third-party funding will further establish itself on the market.

The trend towards funding is also noticeable in the field of M&A, where W&I insurance is on the rise. The function of W&I insurance is essentially to protect the buyer or seller by transferring their respective risks resulting from certain representations and warranties to the insurer. Especially in large M&A transactions, risk distribution is an intensely negotiated issue with corresponding potential to cause the deal to fail. By bringing in the W&I insurance and the associated assignment of risks, this potential can be contained. This might be the reason why this form of insurance has become a preferred 'tool' of buyers and sellers. This naturally involves shifting disputes over claims for damages to the insurer.

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The Inside Track

What is the most interesting dispute you have worked on recently and why?

We are currently representing a client in several international ICC arbitration proceedings involving plant construction and engineering projects in Iran. The cases are interrelated and interlinked on the factual level and at the level of the parties, which requires complex strategical considerations, and we had to deal with a plethora of procedural issues before even filing of the Requests for Arbitration. Different choice of law clauses have also required the close cooperation with colleagues in other jurisdictions, in particular in Iran and Switzerland. Also, the Iran background of the case has posed a variety of challenges, with of the arbitrations being suspended because the ICC banks initially refused to accept the advance on costs in view of US sanctions law.

What do you consider to have been the most significant legal development or change in your jurisdiction of the past 10 years?

The most significant development is not so much a legal one as an actual one: the technical progress that has found its way into law firms and courts. Now that law firms have been picking up on technical developments for years, state courts are also being affected by this development. The Regulation on the Introduction of Electronic Legal Transactions provides for the mandatory use of the 'special electronic lawyer's mailbox' as of 2022, a secure email system for all correspondence between lawyers and courts. The aim is an exclusively electronic file management at the courts. At the same time, the covid-19 pandemic has enabled the use of various technical measures. Oral hearings and even evidentiary hearings via videoconferencing are likely to remain a fixture of the judicial landscape even after the pandemic has come to an end.

What key changes do you foresee in relation to dispute resolution in the near future arising out of technological changes?

Major changes will result from the implementation and use of artificial intelligence in the processing of lawsuits by both law firms and courts. Pilot projects are already underway at some courts in which the parties' submissions are processed and analysed with technical support. It remains to be seen how quickly this development will take place and what further developments AI will bring to dispute resolution.

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Led by Simon Bushell of Seladore Legal, this *Dispute Resolution* volume features discussion and analysis of emerging trends and hot topics within key jurisdictions worldwide.

Market Intelligence offers readers a highly accessible take on the crucial issues of the day and an opportunity to discover more about the people behind the most significant cases and deals.

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