Draft bill

of the Federal Ministry of Justice

Draft Bill for the Modernisation of Arbitration Law

A. Task and objective

The key goal of the present legislative proposal is to make changes in select instances to the German arbitration law now that more than 25 years have elapsed since Book 10 of the Code of Civil Procedure (*Zivilprozessordnung* – ZPO) was fundamentally restated by way of the Act on the Revision of Arbitration Law (*Gesetz zur Neuregelung des Schiedsverfahrensrechts*) of 22 December 1997 (published in the Federal Law Gazette I p. 3224), the intention being to align this area of law with modern needs, to enhance its efficiency and to boost Germany's attractiveness as a venue for arbitration.

Private arbitration is counted among those out-of-court dispute resolution procedures that, by tradition, supplement national state court litigation. Together with the judiciary, it plays a key role for Germany as a forum for legal proceedings and a place to do business.

One of the decisive factors making Germany an attractive dispute resolution centre is a high-quality and internationally competitive arbitration law. German arbitration law as provided for in Book 10 of the Code of Civil Procedure was comprehensively reformed when it was restated in 1997. Over the course of the past quarter of a century, the vast majority of the amendments introduced by the reform have proven effective. For many questions that were not addressed expressly at the time, suitable solutions have been found by arbitral tribunals and state courts. In light of these circumstances, no fundamental reassessment of German arbitration law is required at this juncture.

That said, the field of commercial arbitration has seen a number of developments calling for an adjustment of German law in select instances. Besides the wide-ranging experience gained by jurisprudence in applying the restated Act, this concerns in particular

– the revision of the Model Law on International Commercial Arbitration by the United Nations Commission on International Trade Law (UNCITRAL) (referred to hereinbelow as the "UNCITRAL Model Law") in 2006,

– various reforms of the national arbitration laws applying in the neighbouring states and the revision of the arbitration rules of major arbitral institutions, as well as

– the continuously advancing digitalisation of procedural law.

The present draft has been prepared against the backdrop of achieving the goals and targets set out in the resolution adopted by the General Assembly of the United Nations on 25 September 2015, "Transforming our World: the 2030 Agenda for Sustainable Development" and in particular contributes to realising Sustainable Development Goal 16: to promote the rule of law at the national and international levels, to ensure equal access to justice for all and to build effective institutions at all levels.

B. Solution

The further development of German arbitration law calls for an appropriate degree of circumspection to be exercised. Changes to the tried-and-tested, well-established concepts based on which arbitral tribunals and state courts operate are made only if this serves to advance the law. New provisions and legal principles are put in place where this is required in order to further enhance the quality of dispute resolution by arbitral tribunals or to improve the competitiveness of the German arbitration law at the international level.

C. Alternatives

None.

D. Budgetary expenditure not including compliance costs

[…]

E. Compliance costs

[…]

F. Further costs

[…]

Draft bill of the Federal Ministry of Justice

Draft Bill for the Modernisation of Arbitration Law

dated ...

The Bundestag has adopted the following Act:

Article 1

Amendment of the Code of Civil Procedure

The Code of Civil Procedure in the version as promulgated on 5 December 2005 (published in the Federal Law Gazette I p. 3202; 2006 I p. 431; 2007 I p. 1781), as last amended by … [insert: Article 2 of the Proposal for an Act to Promote Germany as a Forum for Legal Proceedings by Introducing Commercial Courts and English as a Court Language in Civil Jurisdiction (Act for the Promotion of Germany as a Forum) (*Gesetz zur Stärkung des Justizstandortes Deutschland durch Einführung von Commercial Courts und der Gerichtssprache Englisch in der Zivilgerichtsbarkeit (Justizstandort-Stärkungsgesetz*)), Bundestag printed paper 20/8649], is amended as follows:

1. The table of contents is amended as follows:

   a) The following particulars are inserted after the particulars concerning section 1054:

   “Section 1054a Concurring or dissenting opinion

   Section 1054b Publication”.

   b) In the particulars concerning Book 10 Division 7, the word “Rechtsbehelf” (singular) is replaced by the word “Rechtsbehelfe” (plural) in the German version (while “legal remedies” remains in place unchanged in the English version [note of the translator]).

   c) The following particulars are inserted after the particulars concerning section 1059:

   “Section 1059a Request for retrial of the case”.

   d) The following particulars are inserted after the particulars concerning section 1063:

   “Section 1063a Proceedings before the commercial courts in arbitration-related matters

   Section 1063b Submission of documents written in English in German-language proceedings”.

2. In section 1025 (2), the particulars “sections 1032, 1033 and 1050” are replaced by the words “sections 1032, 1033, 1041 (2) to (4) sentence 1 and section 1050”.

3. Section 1031 (4) reads as follows:

   “(4) Compliance with the form stipulated in subsection (1) is not required if the arbitration agreement is a commercial transaction for all parties. If the arbitration agreement was concluded without any form requirements being observed, then any party may demand that the other party provide it with a confirmation in text form of the arbitration agreement’s substance.”

4. The following sentence is appended to section 1032 (2):

“Upon request, the court decides, in connection with its decision according to sentence 1, also on the existence or the validity of the arbitration agreement.”

5. Section 1035 is amended as follows:

a) The following subsection (4) is inserted after subsection (3):

“(4) Unless they have agreed otherwise, joined parties are to jointly make the appointment of an arbitrator that is incumbent on them. If an arbitrator is not so jointly appointed within one month following receipt of a corresponding request to do so from the other party, then the court is to appoint the arbitrator upon request of that party. In such event, the court may also, after having heard the other party, assume the task of appointing an arbitrator that is incumbent on that other party. The mandate of the arbitrator already appointed ends upon the appointment under sentence 3 being made.”

b) The previous subsections (4) and (5) become subsections (5) and (6).

6. The following subsection (4) is appended to section 1040:

“(4) If the arbitral tribunal considers itself to lack jurisdiction, then as a rule, it will decide on an objection in accordance with subsection (2) by procedural award. A procedural award may be set aside in accordance with section 1059 also if the party filing the application shows sufficient cause that the arbitral tribunal wrongly considered itself to lack jurisdiction.”

7. Section 1041 (2) reads as follows:

“(2) Upon request by a party, the court is to permit the enforcement of a measure pursuant to subsection (1). It may recast the measure under subsection (1) if this is necessary for it to be enforced, and may permit its enforcement in this recast version. The application to permit enforcement is to be dismissed only

1. if, in accordingly applying section 1059 (2), one of the grounds for setting aside the arbitral award is given,

2. if an application for a corresponding interim measure already has been filed with a domestic court,

3. if the arbitral tribunal’s requirement as to the provision of security has not been complied with or

4. if the interim measure has been terminated or suspended by the arbitral tribunal.

In the cases provided for by sentence 3, the court will terminate the interim measure if the place of arbitration is located in the Federal Republic of Germany; otherwise, the court will declare that the measure is not to be recognised domestically. The court may make the permission of enforcement dependent on security being provided even if the arbitral tribunal has not required reasonable security to be provided. Section 1064 (1) and (3) is to be applied accordingly; in all other regards, allegations as to fact are to be demonstrated to the satisfaction of the court.”

8. Section 1047 is amended as follows:

a) Subsection (2) is replaced by the following subsections (2) and (3):

"(2) The arbitral tribunal may also arrange the hearing for oral argument, upon having heard the parties, such that image and sound transmission are used (video hearing). Sentence 1 does not apply if the parties have agreed otherwise.

(3) The parties shall be given sufficient advance notice of any hearing and any meeting of the arbitral tribunal arranged for the purpose of taking evidence as well as of the fact that they are to be held as a video hearing."

b) The previous subsection (3) becomes subsection (4).

9. Section 1054 is amended as follows:

a) The following subsection (2) is inserted after subsection (1):

"(2) Unless a party raises an objection, the arbitral award also may be part, in derogation from subsection (1) sentence 1, of an electronic document that sets out, at the end of the arbitral award, the names of the members making up the arbitral tribunal and that has been signed by each member using their qualified electronic signature."

b) The previous subsections (2) and (3) become subsections (3) and (4).

c) The previous subsection (4) becomes subsection (5) and the words "or corresponding to the form provided for in subsection (2)" are inserted after the words "signed by the arbitrators".

10. The following sections 1054a and 1054b are inserted after section 1054:

"Section 1054a

Concurring or dissenting opinion

(1) An arbitrator may put in writing, as a concurring or dissenting opinion, the views they have stated in the deliberations of the arbitral tribunal that deviate from the arbitral award or from the reasons upon which it is based, unless the parties agree otherwise.

(2) Where an arbitrator intends to submit a concurring or dissenting opinion, they are to inform the other arbitrators of this fact as soon as the status reached in the deliberations allows.

(3) The concurring or dissenting opinion does not constitute a part of the arbitral award. It is to be set out in writing and is to be signed by the arbitrator. Section 1054 (2) to (5) applies accordingly.

Section 1054b

Publication

(1) With the consent of the parties, the arbitral tribunal may publish the arbitral award and, if applicable, any concurring or dissenting opinions, as a whole or in part, in anonymised or pseudonymised form, or it may initiate such a publication. Consent is deemed to have been given by a party unless it has raised an objection within one month of having received the request for consent from the arbitral tribunal, provided that this consequence previously was indicated to the party.

(2) The parties are free to make arrangements in derogation from subsection (1).

(3) Any further-reaching requirements for the publication of arbitral awards that result from other legal provisions remain unaffected."

11. In the heading of Book 10 Division 7, the word "Rechtsbehelf" (singular) is replaced by the word "Rechtsbehelfe" (plural) in the German version (while "legal remedies" remains in place unchanged in the English version [note of the translator]).

12. Section 1059 is amended as follows:

a) The following sentence is appended to subsection (1):

"Section 1040 (4) sentence 2 and section 1059a remain unaffected."

b) The following sentence is inserted after subsection (3) sentence 2:

"If, at this point in time, proceedings designated in section 1062 (1) number 2 are pending, then the period begins on the day on which the decision terminating the proceedings has become final and binding or on which the proceedings have come to an end for another reason."

13. The following section 1059a is inserted after section 1059:

"Section 1059a

Request for retrial of the case

(1) If it is no longer admissible to file an application to have an arbitral award set aside as provided for in section 1059, then, upon request, the arbitral award may be set aside by a court if the party filing the request shows sufficient cause that the prerequisites for an action for retrial of the case defined in section 580 are given. Section 581 is not to be applied.

(2) A request for retrial of the case is admissible only if the party filing the request was unable, through no fault of their own, to assert the cause for retrial of the case in earlier proceedings, in particular in proceedings for setting aside an arbitral award as provided for in section 1059.

(3) The request is to be filed within a statutory period of one month. Section 586 (2) and (4) is to be applied accordingly.

(4) Where the court sets aside the arbitral award after said award has been declared enforceable, it is to concurrently set aside the declaration of enforceability.

(5) Section 1059 (4) and (5) applies accordingly."

14. The following sentence is appended to section 1060 (2):

"Section 1059 (4) and (5) applies accordingly."

15. Section 1062 is amended as follows:

a) In subsection (1) number 4, the words "the setting aside (section 1059)" are replaced by the words "the setting aside (sections 1059, 1059a)".

b) Subsection (5) is amended as follows:

aa) The following sentence is inserted after sentence 1:

"Where a commercial court has been instituted with a higher regional court or supreme court of a *Land* on the basis of a statutory instrument in accordance with section 119b (1) of the Courts Constitution Act (*Gerichtsverfassungsgesetz* – GVG), the *Land* government may assign, by statutory instrument, jurisdiction also to the commercial court; the *Land* government may confer such authority, by statutory instrument, upon the *Land* department of justice."

bb) The following sentence is appended:

"If several *Länder* have instituted a joint commercial court at a higher regional court or a supreme court of a *Land*, they may also agree that the commercial court is to have jurisdiction."

16. In section 1063 (3) sentence 1, the words "On application in urgent cases, the" replace the word "The".

17. The following sections 1063a and 1063b are inserted after section 1063:

"Section 1063a

Proceedings before the commercial courts in arbitration-related matters

(1) In derogation from section 184 of the Courts Constitution Act, the proceedings designated in section 1062 (1) will be conducted before a commercial court in English in their entirety

1. if, on the basis of a statutory instrument according to section 184a (1) sentence 1 number 2 of the Courts Constitution Act, proceedings are conducted in English before said commercial court that relate to selected fields of disputes listed in section 119b (1) sentence 1 of the Courts Constitution Act and

2. if the parties expressly or tacitly have agreed on this language or if the respondent, represented by counsel, makes a plea in the statement of defence in this language without raising an objection.

The court orders defined in section 1063 (1) sentence 1 that are made in English are to be translated into German; the translation is to be inseparably attached to the court order. Sections 615, 616 and 617 (2) as well as (3) sentence 2 of the present Code and section 184a (3) sentence 1 numbers 1 to 3 of the Courts Constitution Act apply accordingly.

(2) If, in proceedings designated in section 1062 (1), the language of the court is German or if, as provided for in subsection (1) sentence 1, it is English, then the parties are free to make submissions to the commercial court also in the respective other language insofar as they expressly or tacitly have agreed on this, unless a party raises an objection thereto without undue delay.

(3) The court order issued by a commercial court under section 1063 (1) sentence 1 is to be published. A court order written in English is to be published together with its translation into German.

(4) Sections 621 and 622 are to be applied accordingly if the proceedings designated in section 1062 (1) are conducted before a commercial court.

Section 1063b

Submission of documents written in English in German-language proceedings

(1) Any English-language document that has been prepared or submitted in arbitral proceedings may be submitted by the parties, in proceedings designated in section 1062 (1) and (4) that are being conducted in the German language, also in English.

(2) A direction from the court as provided for in section 142 (3) may be issued only if there is a special need, in the individual case, for a translation to be submitted."

18. In section 1064 (1), the following sentence is appended:

"Where the arbitral award has been made in the form provided for in section 1054 (2), it suffices for it to be transmitted as an electronic document."

19. The following subsections (3) and (4) are appended to section 1065:

(3) The Federal Court of Justice will conduct proceedings on complaints on points of law in the English language if

1. proceedings under the terms of section 1063a (1) sentence 1, have been conducted previously,

2. this has been applied for in the notice of complaint on points of law and

3. the Federal Court of Justice complies with the application.

Where an application under sentence 1 number 2 is filed, section 618 applies accordingly. If the Federal Court of Justice consents to the proceedings being conducted in English, then section 1063a (2) applies accordingly, and section 184a (3) sentence 1 numbers 1 to 3 of the Courts Constitution Act applies accordingly subject to the proviso that section 142 (3) continues to be applicable. Section 184b (2) of the Courts Constitution Act applies accordingly.

(4) The court order under section 577 (6) sentence 1 made in English is to be translated into German; the translation is to be inseparably attached to the court order."

Article 2

Amendment of the Introductory Act to the Code of Civil Procedure

The following section 37c is inserted after section 37b of the Introductory Act to the Code of Civil Procedure (*Gesetz, betreffend die Einführung der Zivilprozessordnung*) in the rectified version published in the Federal Law Gazette Part III, classification code 310-2, as last amended by … [insert: Article 3 of the Proposal for an Act to Promote Germany as a Forum for Legal Proceedings by Introducing Commercial Courts and English as a Court

Language in Civil Jurisdiction (Act for the Promotion of Germany as a Forum), Bundestag printed paper 20/8649]:

"Section 37c

Transitional provision on the Act on the Modernisation of Arbitration Law

(1) The effectiveness of arbitration agreements concluded prior to … [insert: date of the entry into force of this Act in accordance with Article 4] is assessed in accordance with the laws in force until that point in time.

(2) For arbitral proceedings that had not yet come to an end on … [insert: date of the entry into force of this Act in accordance with Article 4], the laws in force until that point in time are to be applied. However, the parties may agree to apply the new laws.

(3) For court proceedings pending as per … [insert: date of the entry into force of this Act in accordance with Article 4], the laws in force until that point in time are to be applied."

Article 3

Amendment of the Court Costs Act

Subsection (7) of the note on number 9005 of Annex 1 (Cost Schedule) to the Court Costs Act (*Gerichtskostengesetz* – GKG) in the version as promulgated on 27 February 2014 (published in the Federal Law Gazette I p. 154), as last amended by … [insert: Article 4 of the Proposal for an Act to Promote Germany as a Forum for Legal Proceedings by Introducing Commercial Courts and English as a Court Language in Civil Jurisdiction (Act for the Promotion of Germany as a Forum), Bundestag printed paper 20/8649], reads as follows:

"(7) Expenditures incurred for translators as a consequence of case files having been translated into German (section 184b (2) sentence 2 of the Courts Constitution Act, also read in conjunction with section 1065 (3) sentence 4 of the Code of Civil Procedure), or for the translation of decisions for purposes of publication (section 617 (3) of the Code of Civil Procedure, section 1063a (1) sentence 2 of the Code of Civil Procedure and section 1065 (4) of the Code of Civil Procedure), will not be charged."

Article 4

Amendment of the Judicial Remuneration and Compensation Act

The Judicial Remuneration and Compensation Act (*Justizvergütungs- und -entschädigungsgesetz* – JVEG) of 5 May 2004 (published in the Federal Law Gazette I p. 718, 776), as last amended by … [insert: Article 5 of the Proposal for an Act to Promote Germany as a Forum for Legal Proceedings by Introducing Commercial Courts and English as a Court Language in Civil Jurisdiction (Act for the Promotion of Germany as a Forum), Bundestag printed paper 20/8649], is amended as follows:

1. In section 1 (1) sentence 1 number 1, a comma and the words “also read in conjunction with section 1063a (4) of the Code of Civil Procedure” are inserted after the words “Code of Civil Procedure”.

2. Section 9 (7) reads as follows:

“(7) The court reporter instructed in accordance with section 622 (2) of the Code of Civil Procedure, also read in conjunction with section 1063a (4) of the Code of Civil Procedure, receives the same remuneration as an interpreter.“

Article 5

Entry into force

This Act enters into force on … [insert: date of the first day of the second quarter following the date of promulgation].

Explanatory memorandum

A. General Part

I. Objective and need for the provisions

The goal of the present draft is to strengthen Germany as a centre for dispute resolution by modernising its arbitration law, thus further boosting the Federal Republic of Germany as an attractive venue for the pursuit of major domestic and international arbitral proceedings in the fields of trade and commerce.

Arbitration proceedings offer companies and private citizens the opportunity to bindingly settle their disputes in special out-of-court proceedings that are in line with the individual needs of the parties and that can be organised according to their preferences. In particular, arbitral proceedings leave it to the parties to select the arbitrators, the rules of procedure, the applicable law and the place of arbitration. In this regard, the arbitration law enshrined in Book 10 of the Code of Civil Procedure constitutes the legal framework. Among other aspects, it provides for the arbitration agreement, the composition of arbitral tribunals, and the conduct of the arbitral proceedings. Furthermore, it establishes legal remedies for having an arbitral award set aside while providing clarity on the prerequisites governing its recognition and declaration of enforceability.

Ever since the Act on the Revision of Arbitration Law of 22 December 1997 entered into force (published in the Federal Law Gazette I p. 3224) on 1 January 1998, German arbitration law has proven effective in the vast majority of cases. The objective pursued at the time by the legislator – of strengthening Germany as a forum for arbitration by putting in place a clear, coherent and internationally competitive arbitration law – has been achieved.

The 2006 revision of the Model Law on International Commercial Arbitration by the United Nations Commission on International Trade Law (UNCITRAL) (referred to hereinbelow as the UNCITRAL Model Law), the legal reforms effected in neighbouring states in Europe (e.g. France, Austria and Switzerland), the detailed revisions by many major arbitral institutions of their arbitration rules and the continuously advancing digitalisation of procedural law provide reasons, however, to further develop and to improve specific details of the provisions currently in force. For Germany to be a strong centre for dispute resolution, it needs to have not only a modern and effective civil judiciary, but also a highly developed system of alternative dispute resolution.

The present draft is intended to contribute towards achieving the Sustainable Development Goal 16 of the 2030 Agenda of the United Nations, which enjoins its signatories to promote the rule of law at the national and international level, to ensure equal access to justice for all and to build effective institutions at all levels.

II. Essential content of the legislative proposal

The present draft serves the further development of German arbitration law. Provisions are amended or newly introduced in select instances in order to reflect the above-referenced domestic and international developments and to bring this area of law in line with modern needs. The draft bill provides for amendments wherever they serve legal progress and are appropriate for enhancing the international competitiveness of Germany as a forum for dispute resolution.

On the details:

1. Revision of the UNCITRAL Model Law in 2006

Book 10 of the Code of Civil Procedure, which was subjected to in-depth reforms by the Act on the Revision of Arbitration Law of 22 December 1997, was structured in line with the UNCITRAL Model Law dating from 1985 (Bundestag printed paper 13/5274, p. 24 et seqq.), which provides the parties to a dispute with an internationally recognised set of rules with which legal practitioners experienced in this field are familiar. In 2006, this Model Law was amended in a number of instances and, by a resolution adopted by the General Assembly of the United Nations of 4 December 2006, it was recommended that all UN member states give due consideration to the revised articles. As part of this revision, supplementations or amendments were made in the following topical areas:

– expansion of the scope of application of the Model Law (Article 1 (2) of the UNCITRAL Model Law),

– creation of a statutory interpretation rule (Article 2 A of the UNCITRAL Model Law),

– modification of the form requirements to be met by arbitration agreements (Article 7 options I and II of the UNCITRAL Model Law),

– restatement of the provisions relating to interim measures issued by arbitral tribunals (Article 17 to 17 J of the UNCITRAL Model Law),

– reduction of the requirements governing documentary evidence to be presented for the recognition of arbitral awards and declaration of their enforceability (Article 35 (2) of the UNCITRAL Model Law).

In keeping with the approach under German arbitration law, which has proven effective, the above amendments and supplementations of the UNCITRAL Model Law were reviewed, in preparing the present legislative proposal, as to whether implementing them in German arbitration law is appropriate.

The extension of the scope of application of the UNCITRAL Model Law to cover decisions to admit the enforcement of interim measures issued by foreign arbitral tribunals (Article 1 (2) read in conjunction with Articles 17 H to 17 J of the UNCITRAL Model Law) has been implemented in the present legislative proposal, with some changes being made, in section 1025 (2) of the present draft bill. By way of including a limitation to commercial transactions, option II of Article 7 of the UNCITRAL Model Law likewise was included in the present legislative proposal, which enables arbitration agreements to be concluded without adhering to any form requirements. The detailed provisions of the revised UNCITRAL Model Law relating to interim measures issued by arbitral tribunals (Article 17 to 17 J of the UNCITRAL Model Law) likewise were taken into account in restating section 1041 (2) in the present draft bill; however, there was consensus that no practical need existed to implement the provisions in every detail.

The possibility to submit an arbitral award in proceedings for the declaration of enforceability without supplying a translation into German (Article 35 (2) sentence 2 of the UNCITRAL Model Law), has been reflected in part – as regards the English language – in section 1063b (1) of the present draft bill. Submitting a simple copy of an arbitral award as a basis for it to be declared enforceable, as has been provided for in Article 35 (2) sentence 1 of the UNCITRAL Model Law, has not been implemented, however, since section 1064 (1) of the Code of Civil Procedure, which stipulates that a certified copy must be provided, is nothing more than a rule of evidence and since already today, an arbitral award can be submitted as a simple copy where its existence and authenticity are not disputed (cf., as an example, the court order issued by the Higher Regional Court of Frankfurt am Main on 17 May 2021

– 26 Sch 1/21, BeckRS online database of court rulings 2021, 11890 at margin number 37). If the existence or authenticity of an arbitral award is disputed, however, then a simple copy will not suffice to meet the evidentiary requirements. In any case, the continued requirement for certification does not impose a particular burden on the party filing the application since, according to section 1064 (1) sentence 2 of the Code of Civil Procedure, counsel authorised to represent the party before the court also may perform the certification (*Münch*, *Zeitschrift für Zivilprozess international* (ZZPInt, Journal for International Civil Procedural Law) 23 [2018], 259 [275]).

No statutory provision modelled on Article 2 A of the UNCITRAL Model Law was included, and this for a number of reasons. Said provision stipulates in its paragraph (1) that, in interpreting the Model Law, regard is to be had to its international origin, the need to promote uniformity in its application and the observance of good faith. Moreover, Article 2 A (2) of the UNCITRAL Model Law requires questions that have not been expressly settled in the UNCITRAL Model Law to be settled in conformity with the general principles on which the Model Law is based. This Article was not transposed into German law since German civil procedural law does not codify any provisions on how to interpret the law. Thus, were Article 2 A of the UNCITRAL Model Law to be implemented, this would have given rise to the question of the relationship that such an interpretation rule has with other established methods of interpretation that have not been enshrined in law. Moreover, if a statutory interpretation rule were to be introduced, then – by way of reversing the logic – it would be possible to deduce that provisions of the Code of Civil Procedure that are not subject to this rule specifically are not to be interpreted in accordance with the principles enshrined in the law (*Münch*, ZZPInt 23 [2018], 259 [267–269]). Since, moreover, fundamental aspects are addressed in Article 2 A of the UNCITRAL Model Law that already form part of the existing canon of interpretation and methods anyway, codifying those requirements would hardly have entailed any positive effects for the practical application of the law.

The decision to not implement Article 2 A of the UNCITRAL Model Law does not mean that the principles of interpretation and methods set out therein are not shared. On the contrary: As before, arbitral tribunals and state courts are required to take account – in interpreting and applying those provisions of the Code of Civil Procedure that are based on the UNCITRAL Model Law – of the international origin of said provisions, to ensure uniformity in their interpretation and application, and to observe good faith. In any event, it is a matter of course in a modern constitutional state for courts, and likewise arbitral tribunals, to decide, on questions that have not been expressly provided for, in accordance with the general principles of the applicable law (*Münch*, ZZPInt 23 [2018], 259 [269]), and is so done by German courts and arbitral tribunals alike. For this reason, the state courts and the arbitral tribunals as a rule are to have regard, as before, to the past decisions issued by foreign courts and arbitral tribunals in interpreting the respective provisions, and generally are to strive for a uniform understanding of said provisions at the international level. The UNCITRAL CLOUT database (Case Law on UNCITRAL Texts), which stores major decisions issued by courts and arbitral tribunals that pertain to the UNCITRAL Model Law, can make a contribution towards achieving this objective.

2. Internationalisation and digitalisation of procedural law

In the 25 years that have elapsed since the German arbitration law was restated, the internationalisation and digitalisation of procedural law has increased by leaps and bounds. The present legislative proposal picks up on these developments and ensures in this way that the German arbitration law is in line with the needs of modern arbitration practice and that arbitral proceedings can continue to be conducted in Germany in an efficient manner while meeting the highest standards. To this end, it is intended to take the following individual measures:

– In the world of international arbitration, English is regarded as “lingua franca.” In order to reflect the major role this language plays in practice, section 1063b of the present

draft bill stipulates that in court proceedings designated in section 1062 (1) and (4) of the Code of Civil Procedure, which are conducted in the German language, it is possible to submit to the court English-language documents originating from arbitral proceedings without supplying a translation into German. A translation will have to be provided only where a particular need is given in the individual case.

– By instituting commercial courts with certain higher regional courts or with supreme courts they have established for their territory, the *Länder* will be able to stipulate that these courts conduct the proceedings before them, in their entirety, in English upon a corresponding agreement having been reached by the parties. Section 1063a (1) of the present draft bill enables commercial courts, to whom jurisdiction has been assigned by a statutory instrument enacted by the *Land* government to rule on the types of proceedings designated in section 1062 (1) of the present draft bill, to conduct these proceedings in their entirety also in English if the parties have agreed to do so. This option also is created for any proceedings on complaints on points of law before the Federal Court of Justice that potentially may ensue (section 1065 (3) and (4) of the present draft bill). Both of these provisions highlight the alignment of German arbitration law with the needs given at the international level.

– In recent years, arbitral practice has garnered positive experiences in many cases where oral hearings before arbitral tribunals were conducted using image and sound transmission (known as “video hearings”). Against this backdrop, the present draft bill proposes, in section 1047 (2) and (3), discretionary legal provisions allowing oral hearings to be conducted in this manner; this is done in order to provide clarity as to this manner of proceeding being permissible and to further increase legal certainty in this regard.

– Section 1054 (1) sentence 1 of the Code of Civil Procedure as it currently stands is based on the concept of an arbitral award that is issued in writing and with a wet-ink signature of the arbitrators. Against this backdrop, the intention is, by enacting section 1054 (2) of the present draft bill, to further promote digitalisation by allowing the arbitral award to be contained in an electronic document in future – provided none of the parties objects – that sets out, at its end, the names of the members of the arbitral tribunal and that has been signed by each member using their qualified electronic signature.

3. Further measures serving to promote Germany as a forum for dispute resolution

Besides taking account of developments in the digitalisation and internationalisation of procedural law, the legislative proposal includes further measures that will enhance German arbitration law in a targeted fashion, not only strengthening Germany’s role as a venue for arbitration, but also underlining the rule of law of arbitral dispute resolution.

– The institution of commercial courts with certain higher regional courts or with supreme courts established by the *Länder* for their territory means that there will be highly specialised formations at German courts specialising in the settlement of complex commercial disputes. The present legislative proposal unlocks this particular expertise for arbitration by enabling the *Länder*, by means of section 1062 (5) sentence 2 and 4 of the present draft bill, to assign by statutory instrument to a commercial court or to a joint commercial court, respectively, all or only certain of the proceedings designated in section 1062 (1) of the Code of Civil Procedure to be conducted before the higher regional courts or supreme courts of the *Länder*.

– Frequently, the decisions issued by arbitral tribunals meet the highest standards in jurisprudence. In order to increase the transparency of arbitration and to promote the further development of the law, arbitral tribunals now expressly are given the possibility,

by section 1054b of the present draft bill, to publish their arbitral awards if the parties agree to the publication of the arbitral tribunals' decisions.

– In international arbitration, concurring and dissenting opinions are commonplace. Accordingly, section 1054a of the present draft bill for the first time expressly permits an arbitrator serving in arbitral proceedings with more than one arbitrator that have their place of arbitration in Germany to set out in a concurring or dissenting opinion the views they have stated in the deliberations that deviate from the arbitral award or from the reasons upon which it is based.

– The reopening of proceedings has been clearly provided for where this concerns proceedings before state civil courts. By contrast, codified law currently does not provide for any opportunity, even if an arbitral award were to be marred by the gravest flaws, to have it set aside by a court once a period of three months has elapsed (section 1059 (3) of the Code of Civil Procedure). For this reason, section 1059a of the present draft bill creates an extraordinary legal remedy – known as a "request for retrial of the case" – which will allow an arbitral award to be set aside by a court also after this period has elapsed. The strong binding effect of arbitral awards continues in force unchanged as a consequence of the particularly restrictive definition of what constitutes a cause for retrial of the case (section 580 of the Code of Civil Procedure) and of the already existing opportunity of bringing an action on the basis of section 826 of the Civil Code (*Bürgerliches Gesetzbuch* – BGB).

4. Experience gained in arbitration practice and developments in the legal systems of neighbouring countries

In recent years, various neighbouring states of Germany have launched reforms of their arbitration laws. For example, Switzerland saw a reform of its arbitration law enter into force on 1 January 2021 (AS [*Amtliche Sammlung*, Official Compilation of Federal Legislation] 2020 4179); Austrian law was reformed in 2013 by the Act Amending Arbitration Law (*Schiedsrechts-Änderungsgesetz*) of 2013 (published in the Austrian Federal Law Gazette I no. 118/2013), and French arbitration law likewise was amended in 2011 (*Décret n° 2011-48 du 13 janvier 2011 portant réforme de l'arbitrage*, decree reforming arbitration). Due regard was had to said reforms in preparing the present legislative proposal, while the experience gained in arbitration practice over the past 25 years with Book 10 of the Code of Civil Procedure likewise was taken into account. Where the incorporation of practical experience gained in the reform of Book 10 of the Code of Civil Procedure and the reforms initiated abroad are concerned, two modifications are to be highlighted:

– As regards arbitral proceedings involving multiple parties on one side, an express provision was included in section 1035 (4) of the present draft bill relating to the joint appointment of an arbitrator whose appointment is incumbent on that side. Concurrently, clarification was provided on how to proceed if, notwithstanding that provision, a joint appointment of an arbitrator is not made and such appointment is to be made by the court. In this regard, German arbitration law in future will follow the path forged by reformed Swiss law (Article 362 (2) of the Swiss Code of Civil Procedure or Article 179 (5) of the Swiss Federal Act on Private International Law [*Bundesgesetz über das Internationale Privatrecht*] respectively) and will grant the court discretionary power in deciding whether, for reasons of equal treatment, it will concurrently appoint the arbitrator to be appointed by the other side.

– German case law has highlight that, at present, no opportunity is available for correction by a court of a negative decision on jurisdiction by an arbitral tribunal (Federal Court of Justice [BGH], court order of 6 June 2002 – III ZB 44/01, *Neue Juristische Wochenschrift* (NJW, New Judicial Weekly Journal) 2002, 3031 [3032] = *Entscheidungen des Bundesgerichtshofes in Zivilsachen* (BGHZ, Rulings of the Federal Court of Justice in Civil Law Matters) 151, 79). Where, in the view of a judge,

an arbitral tribunal has wrongly declared itself to lack jurisdiction, this decision is final. In order to afford equal treatment in future to positive and negative decisions on jurisdiction that are issued by arbitral tribunals, section 1059 of the present draft bill read in conjunction with section 1040 (4) sentence 2 of the present draft bill provides that procedural awards denying jurisdiction of the arbitral tribunal can be set aside by a court also in those cases in which the arbitral tribunal wrongly has declared itself to lack jurisdiction.

III. Alternatives

None.

IV. Legislative competence

The legislative competence of the Federation is enshrined in Article 74 (1) number 1 of the Basic Law (*Grundgesetz* – GG) (court procedure).

V. Compatibility with European Union law and international treaties

The legislative proposal is compatible with European Union law and the international treaties the Federal Republic of Germany has entered into.

VI. Regulatory impacts

1. Simplification of the law and administrative procedures

The present draft bill serves to simplify the law and administrative procedures.

To cite but one example, such simplification of the law and of administrative procedures is achieved by forgoing to a limited degree, in future, the form requirements that are to be met by arbitration agreements (section 1031 (4) of the present draft bill), by providing clarity on the requirements for oral hearings before arbitral tribunals held as video hearings (section 1047 (2) and (3) of the present draft bill) and by enabling English-language documents originating from arbitral proceedings to be submitted in court proceedings designated in section 1062 (1) and (4) of the Code of Civil Procedure also without supplying a translation into German (section 1063b of the present draft bill).

2. Aspects of sustainability

The legislative proposal is compliant with the guiding principles subscribed to by the Federal Government regarding sustainable development within the meaning of the German Sustainable Development Strategy, which serves to implement the 2030 Agenda for Sustainable Development of the United Nations.

The legislative proposal provides for amendments in select instances of German arbitration law and in this way contributes to the timely realisation of Sustainable Development Goal 16 “Promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels.” This Sustainable Development Goal, by its Goal 16.3, calls for the rule of law to be promoted at the national and international levels and for equal access to justice for all to be ensured. The present draft bill promotes the achievement of this goal by bringing German arbitration law in line with the legal systems of its neighbouring states and with the revised UNCITRAL Model Law, thus boosting the position of Germany as an attractive venue for arbitration, in

particular by easing the form requirements to be met by arbitration agreements in commercial transactions.

Furthermore, because the legislative proposal serves to modernise German arbitration law and to improve the conduct of arbitral proceedings and of the arbitration-related court proceedings in Germany, it also makes a contribution towards the timely achievement of Goal 16.6, which calls for the development of effective, accountable and transparent institutions at all levels. The draft bill promotes the realisation of this Goal by providing for the digitalisation of arbitration law and promoting the publication of arbitral awards. In this way, the effectiveness and efficiency of this form of alternative dispute resolution are increased, its nature as a key component of the rule of law is highlighted and access to justice and to the administration of justice is strengthened.

Thus, the legislative proposal is aligned with the principles enshrined in the German Sustainable Development Strategy "(1.) Apply sustainable development as a guiding principle at all times and in all decisions," "(2.) Assume global responsibility" and "(5.) Preserve and enhance social cohesion in an open society."

3. Budgetary expenditures not including compliance costs

[…]

4. Compliance costs

[…]

5. Further regulatory impacts

[…]

VII. Time limit; evaluation

[…]

B. Special part

Re Article 1 (Amendment of the Code of Civil Procedure)

Re Number 1 (Table of contents)

The changes made to the table of contents are the consequence of the restatement, amendment and supplementation of provisions of the Code of Civil Procedure (*Zivilprozessordnung* – ZPO).

Re Number 2 (section 1025 (2) of the present draft bill)

Section 1025 of the Code of Civil Procedure establishes the territorial scope of application of Book 10 of the Code of Civil Procedure, which governs all arbitral proceedings regardless of their substance (Bundestag printed paper 13/5274, p. 25 and 31), and thus also governs investor-State arbitral proceedings (Federal Court of Justice, court order of 27 July 2023 – I ZB 43/22, BeckRS 2023, 19617, at margin number 38; Federal Court of Justice, court order of 27 July 2023 – I ZB 74/22, BeckRS 2023, 19624, at margin number 34; Federal Court of Justice, court order of 27 July 2023 – I ZB 75/22, BeckRS 2023, 19633, at margin number 38). Depending on whether the place of arbitration (section 1043 (1) of the Code of Civil Procedure) is located within Germany or outside of its territory, as a general rule all

provisions of Book 10 of the Code of Civil Procedure (section 1025 (1) of the Code of Civil Procedure) or only individual provisions will apply (section 1025 (2) of the Code of Civil Procedure).

The existing list in section 1025 (2) of the Code of Civil Procedure of those statutory provisions that are to be applied also in cases in which the place of arbitration is located abroad or has not yet been determined is expanded by section 1041 (2) to (4) sentence 1 of the present draft bill. This serves to provide clarity that interim measures issued by an arbitral tribunal with a foreign arbitral seat also may be admitted by a court, in accordance with section 1041 (2) of the Code of Civil Procedure, for enforcement in Germany. Under the law as it currently stands, the question of whether this opportunity existed had been a matter of dispute (cf., as one example, *Münchener Kommentar zur ZPO* (Munich Commentary on the Code of Civil Procedure)/*Münch*, 6th edition 2022, commentary on section 1041 of the Code of Civil Procedure at margin number 32; Stein/Jonas/*Schlosser*, 23rd edition 2014, commentary on section 1041 of the Code of Civil Procedure at margin number 41; and, as an example of a contrary opinion, *Gottwald/Adolphsen*, *Deutsches Steuerrecht* (DStR, Journal on German Tax Law) 1998, 1017 [1020]; Musielak/Voit/*Voit*, 20th edition 2023, commentary on section 1041 at margin number 6).

By so extending the list set out in section 1025 (2) of the present draft bill, the need given in legal practice for a greater availability of the corresponding interim measures is met while the arbitration-friendliness of German law is promoted. Concurrently, it is made clear that the prerequisite for a domestic enforcement of a corresponding interim measure issued by arbitrators is, in all cases and independently of the place of arbitration, that the court has permitted enforcement under section 1041 (2) of the present draft bill and that a declaration of enforceability issued as an arbitral award under section 1061 (1) of the Code of Civil Procedure is not an available option. In order to emphasise the difference between arbitral awards and interim measures, the supplementation had to be added to section 1025 (2) of the Code of Civil Procedure and not to section 1025 (4) of the Code of Civil Procedure, which applies to arbitral awards (on this, cf. *Horn*, *Der Emergency Arbitrator und die ZPO* (The Emergency Arbitrator and the Code of Civil Procedure), 2019, p. 222; as regards the latter, however, cf. *Münch*, ZZPInt 23 [2018], 259 [273]).

The expansion of section 1025 (2) of the Code of Civil Procedure relates, in specific terms, to the entirety of all provisions that concern the court's permission of enforcement of an interim measure (section 1041 (2) of the present draft bill) and the setting aside of the court order permitting enforcement (section 1041 (3) of the Code of Civil Procedure). The inclusion of these provisions in section 1025 (2) of the Code of Civil Procedure is inspired by Article 1 (2) read in conjunction with Articles 17 H and 17 I of the UNCITRAL Model Law.

Going beyond the UNCITRAL Model Law – no mention is made of Article 17 G in Article 1 (2) of the UNCITRAL Model Law –, the claim for damages under section 1041 (4) sentence 1 of the Code of Civil Procedure is granted, in the case of an interim measure being enforced that proves to have been unjustified from the outset, also in those cases in which the arbitral tribunal ordering such measure had its place of arbitration abroad. The reason is that the prerequisite for this claim to compensation of damages is the permission of enforcement as defined in section 1041 (2) of the present draft bill by a domestic court (*Münchener Kommentar zur ZPO*/*Münch*, 6th edition 2022, commentary on section 1041 of the Code of Civil Procedure at margin number 55; Musielak/Voit/*Voit*, 20th edition 2023, commentary on section 1041 of the Code of Civil Procedure at margin number 14). The existence of the claim for damages has such close ties, in terms of the constituent elements of the matter, to this permission of enforcement granted by a domestic court that, by comparison, the question of whether the interim measure permitted for enforcement was issued by an arbitral tribunal with a domestic or foreign place of arbitration is to be accorded lesser relevance. By contrast, the procedural provision in section 1041 (4) sentence 2 of the Code of Civil Procedure is not to be applied if the place of arbitration is located abroad. Instead, the matter of whether or not the claim for damages provided for in section 1041 (4)

sentence 2 of the Code of Civil Procedure can be asserted in arbitral proceedings that are already pending – just as can be done in domestic arbitral proceedings – is governed by the applicable arbitration law.

Re Number 3 (section 1031 (4) of the present draft bill)

Re Section 1031 (4) sentence 1 of the present draft bill

Section 1031 of the Code of Civil Procedure provides for the form requirements that are to be complied with in concluding an arbitration agreement. If the form stipulated in section 1031 of the Code of Civil Procedure is not adhered to, then an arbitration agreement "will be invalid in all cases" (Bundestag printed paper 13/5274, p. 36; Federal Court of Justice, judgment of 19 May 2011 – III ZR 16/11, published in NJW 2011, 2976 at margin number 7). This conclusion also is to be drawn from the legal concept embodied by section 125 of the Civil Code (Prütting/Gehrlein/*Prütting*, *ZPO – Kommentar* (Commentary on the Code of Civil Procedure), 15th edition 2023, commentary on section 1031 of the Code of Civil Procedure at margin number 10; *Münchener Kommentar zur ZPO/Münch*, 6th edition 2022, commentary on section 1031 of the Code of Civil Procedure at margin number 12).

Under German law in force until 31 December 1997, it was possible to conclude arbitration agreements without complying with any formal requirements, provided that the conclusion of the arbitration agreement constituted a commercial transaction for both sides involved and none of the parties were traders designated in section 4 of the Commercial Code (*Handelsgesetzbuch* – HGB) in its previous version (as stipulated in section 1027 (2) of the Code of Civil Procedure in its previous version). No practical issues in connection with this freedom of form are known to have arisen during this time, in particular none that it would have been unmanageable (*Wolff*, *Zeitschrift für Wirtschaftsrecht und Insolvenzpraxis* (ZIP, Journal for Commercial Law and Insolvency Practice) 2023, 1623 [1625 et seq.]). Following the introduction of option II of Article 7 of the UNCITRAL Model Law in 2006, which for the first time provides within its scope of application that arbitration agreements may be concluded free from any formal requirements, this international legal development is to be reflected and the possibility to effectively conclude arbitration agreements without complying with a specific form requirement is to be reintroduced for a limited group of persons. A number of other legal systems likewise do not stipulate that arbitration agreements must be concluded in writing; this is the case, for example, for Belgian arbitration law (Article 4 of the Belgian *Code Judiciaire*; on this, see *Piers/Vanleenhove/De Meulemeester/Ongenae*, International Commercial Arbitration, 2nd edition 2021, Part 3, E, at margin number 35); the recently reformed arbitration law of Luxembourg (Article 1227 (1) of the new Code of Civil Procedure [*Nouveau Code de Procédure Civile*]; on this, see *Grosbusch/Lange*, *Zeitschrift für Schiedsverfahren* (SchiedsVZ, German Arbitration Journal) 2023, 317 [318]); and Swedish law (*Widjeskog*, International Commercial Arbitration, 2nd edition 2021, Part 3, Q, at margin number 20; further examples are listed in *Münch*, *Juristenzeitung* (JZ, Journal for Legal Experts) 2023, 958 [961]).

A practical need for form-free arbitration agreements is given in particular where global supply chains and complex framework agreements come into play, under which individual contracts are concluded with various companies. In many cases, the duty to comply with contractual obligations will be distributed across a number of different companies worldwide. Often, it is not clear yet at the time such contracts and arbitration agreements are concluded which companies precisely will be involved, and in many cases, not all of the (individual) contracts will include an arbitration clause (on the problems entailed by the subjective scope of arbitration agreements when contracts are concluded with group companies, cf. *G. Wagner*, *Rechtsstandort Deutschland im Wettbewerb* (Germany as a forum for legal proceedings and its competition), 2017, p. 149).

Article II (1) and (2) of the Convention of 10 June 1958 on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) does not conflict with this since the New York Convention is intended to facilitate the recognition of arbitration agreements at the international level, meaning that the provision cannot be understood – contrary to its original intention – as an obstacle preventing recognition (Federal Court of Justice, court order of 30 September 2010 – III ZB 69/09, BGHZ 187, 126 at margin number 8). According to the "more favourable right" clause of Article 7 (1) alternative 2 of the New York Convention, a party may also avail itself of its domestic law, besides the New York Convention, in connection with the recognition and enforcement of an arbitral award. As a consequence, the national legislator is generally free to provide for form requirements that are less stringent than those stipulated in Article II of the New York Convention. Nothing else applies with regard to Article I (2) (a) of the European Convention of 21 April 1961 on international commercial arbitration (European Convention) for the arbitration agreements governed by that Convention.

By way of following the historical model set by section 1027 (2) of the Code of Civil Procedure in its previous version, however, it is intended to introduce the opportunity to conclude form-free arbitration agreements only in commercial transactions (for concurring views, see *Münch*, ZZPInt 23 [2018] 259 [269–272]; *Raeschke-Kessler*, *Festschrift für Siegfried H. Elsing*, 2015, p. 433 [436]). Accordingly, the conclusion of the arbitration agreement as such must constitute, for all parties, a commercial transaction within the meaning of sections 343 et seqq. of the Commercial Code. The reason is that solely by tying in with the concept of a commercial transaction and thus, indirectly, with the concept of a merchant (*Kaufmann*) will it be ensured that only those persons are able to conclude arbitration agreements without having to comply with any form requirements who do not require the special protection afforded by the form requirement stipulated in section 1031 (1) and (2) of the Code of Civil Procedure. By contrast, tying in with the term of trader (*Unternehmer*) as this is defined in section 14 (1) of the Civil Code would have allowed arbitration agreements to be concluded orally also between small businesses or in cases in which persons are involved who operate their enterprise as a secondary occupation. Where these groups of people are concerned, however, it cannot generally be presumed that they do not need to benefit from the protective and warning functions that the form stipulated in section 1031 (1) to (3) of the Code of Civil Procedure entails. This assessment also corresponds – while allowing for differences concerning the details of the matter – to the parallel provision of section 38 (1) of the Code of Civil Procedure for (domestic) choice of forum agreements. Such agreements may be concluded without adhering to any form requirements in commercial relations – thus going beyond the solution intended by section 1031 (4) sentence 1 of the present draft bill that is restricted to commercial transactions between merchants –, which also speaks against an irrefutable need to present evidence in choosing a forum (*Wolff*, SchiedsVZ 2016, 293 [296]; *Wolff*, ZIP 2023, 1623 [1626]; *G. Wagner*, ZIP 2023, 1393 [1394]). Since the form requirements set out in section 1031 (1) to (3) of the Code of Civil Procedure at any rate do not constitute a high threshold, the access to private arbitration by non-merchant parties in commercial relations is not being improperly impeded.

By structuring the provision as an exceptional rule and phrasing it in the negative, it is made clear that whoever intends to take recourse to it must present the facts, and in the event of a dispute must also provide evidence, showing that the arbitration agreement is a commercial transaction for all concerned. If they do not succeed, then section 1031 (1) to (3) of the Code of Civil Procedure will continue to apply.

Re Section 1031 (4) sentence 2 of the present draft bill

Similarly to what is provided for in section 1027 (3) of the Code of Civil Procedure in its previous version, section 1031 (4) sentence 2 of the present draft bill stipulates that, in those cases in which an effective arbitration agreement not adhering to any form

requirements in accordance with section 1031 (4) sentence 1 of the present draft bill has been concluded, every contractual party involved in the arbitration agreement has a claim against the other contractual parties to having a confirmation in text form made available (section 126b of the Civil Code) as regards the arbitration agreement concluded. The written form requirement that was still stipulated in section 1027 (3) of the Code of Civil Procedure in its previous version (section 126 of the Civil Code) is not included in this provision in order to facilitate electronic commercial dealings.

The claim now provided for in section 1031 (4) sentence 2 of the present draft bill serves to enforce the legitimate interests of the parties in documenting their transactions and having clarity regarding the substance of the arbitration agreement they have concluded. The claim to documentation of the arbitration agreement has no effect on the existence of the arbitration agreement that was effectively concluded without adhering to any form requirements.

In terms of the facts and constituent elements of the matter, the documentation claim requires a contract concluded effectively that does not adhere to any form requirements. Such a claim does not exist if the arbitration agreement already was concluded in writing or in text form. This applies likewise to other forms by which the written form requirement is met, such as the electronic form or having the agreement recorded by a notary. In order to comply with the documentation claim, the obligated party must transmit a confirmation in text form that correctly and completely reflects the substance of the arbitration agreement concluded.

As a general rule, the claim to confirmation of the arbitration agreement is not in turn bound by the arbitration agreement that is to be confirmed; this means that generally, it also can be pursued before the state courts (cf. *Schütze/Tscherning/Wais*, *Handbuch des Schiedsverfahrens* (Handbook on Arbitration Proceedings), 2nd edition 1990, p. 45 et seq., at margin number 88 [regarding section 1027 (3) of the Code of Civil Procedure in its previous version]).

Re Number 4 (section 1032 (2) sentence 2 of the present draft bill)

Section 1032 (2) of the Code of Civil Procedure opens up the opportunity to file a request with a state court for a declaratory ruling that establishes the admissibility or inadmissibility of arbitral proceedings until the arbitral tribunal has been established or until the matter has been referred to a permanent arbitral tribunal, respectively (Federal Court of Justice, court order of 9 May 2018 – I ZB 53/17, *Neue Juristische Wochenschrift-Rechtsprechungsreport* (NJW-RR, Adjudication Report of the New Judicial Weekly Journal) 2018, 1402 at margin number 8; *Münchener Kommentar zur ZPO*/*Münch*, 6th edition 2022, section 1032 of the Code of Civil Procedure at margin number 30). According to section 1062 (1) number 2 of the Code of Civil Procedure, the higher regional court is competent in this regard. To cite the Federal Court of Justice, the competent state court examines in these proceedings "whether an effective arbitration agreement exists, whether it is possible to implement it and whether the subject matter of the arbitral proceedings is covered by the arbitration agreement" (Federal Court of Justice, court order of 19 September 2019 – I ZB 4/19, NJW-RR 2020, 147 at margin number 11). Seen from an arbitrator's perspective, section 1040 (1) sentence 1 of the Code of Civil Procedure has a similar function. According to this provision, arbitral tribunals generally are granted the competence to rule on their own jurisdiction. Thus, arbitral tribunals can decide, under this provision, on their own jurisdiction and, in that context, on the existence or validity of the arbitration agreement.

Section 1032 (2) sentence 2 of the present draft bill picks up on the divergent phrasing of the two current provisions and aligns them more closely with one another. By appending sentence 2, it is made clear – by way of mirroring section 1040 (1) sentence 1 of the Code of Civil Procedure – that, upon request, the court also may expressly establish by a

declaratory ruling the existence and the effectiveness of the arbitration agreement, whereby such declaratory ruling has substantive legal force.

The clarification provided in section 1032 (2) sentence 2 of the present draft bill serves procedural economy. Under section 1032 (3) of the Code of Civil Procedure, arbitral proceedings may be pursued in parallel with pending court proceedings governed by section 1032 (2) of the Code of Civil Procedure. However, an arbitral award will not have any prospects of continuing in force if the state court regards the underlying arbitration agreement to be non-existent or ineffective.

In line with the fundamental concept underpinning section 308 (1) sentence 1 of the Code of Civil Procedure, the court may issue an express declaratory ruling only if this has been applied for. Where the parties do not wish to have the court review the existence or validity of their arbitration agreement and instead merely are seeking clarification, for example, of whether the specific subject matter in dispute is within or outside of the objective scope of the arbitration agreement, this continues to be possible.

Re Number 5 (section 1035 (4) to (6) of the present draft bill)

Re lit. a (section 1035 (4) of the present draft bill)

Section 1035 of the Code of Civil Procedure makes discretionary provisions regarding the appointment of the arbitrators. However, the current provision does not stipulate any special requirements for multi-party arbitrations. For the first time now, the corresponding provisions are created by introducing section 1035 (4) of the present draft bill (cf. regarding the location of the provision see *Münch*, ZZPInt 23 [2018], 259 [291] [calling for the insertion as section 1035 (3a) of the present draft bill]; *G. Wagner*, *Rechtsstandort Deutschland im Wettbewerb*, 2017, p. 162 et seq. [calling for the insertion as section 1035 (4a) of the present draft bill]). Thereby, Germany is following the approach taken by Austria (section 587 (5) of the Austrian Code of Civil Procedure) and Switzerland (Article 362 (2) of the Swiss Code of Civil Procedure or Article 179 (5) of the Swiss Federal Act on Private International Law, respectively), which already have introduced comparable provisions.

Section 1035 (4) of the present draft bill is a discretionary provision, as is underlined by its sentence 1 and as also can be concluded from section 1035 (1) of the Code of Civil Procedure. As a consequence, the provision applies only in those cases in which the parties have not made any deviating agreements. The latter could be the case, for example, if the parties agree on institutional arbitration rules to be applied, which in many cases include provisions governing the appointment of the arbitrators for multi-party arbitrations (cf. *Wolff*, SchiedsVZ 2016, 293 [299]).

Section 1035 (4) of the present draft bill will be applicable solely to arbitral proceedings with more than one arbitrator. In the case of multi-party arbitrations with a sole arbitrator, section 1035 (3) sentence 1 of the Code of Civil Procedure applies. Thus, if the parties are unable to agree on the appointment of a sole arbitrator, that arbitrator will be appointed by the court upon request by one party.

Multiple parties on one side are designated in section 1035 (4) of the present draft bill, in line with the terminology in use in civil procedural context, as “joined parties” (*Streitgenossen*) (cf. sections 59 et seqq. of the Code of Civil Procedure).

Re Section 1035 (4) sentence 1 of the present draft bill

Section 1035 (4) sentence 1 of the present draft bill stipulates that, in the case of arbitral proceedings with more than one arbitrator, joined parties are to jointly make the appointment of an arbitrator whose appointment is incumbent on them. This means, for example, for multi-party arbitrations where no agreements have been made regarding the

composition of the arbitral tribunal or the appointment of the arbitrators, that the arbitral tribunal consists of three arbitrators (section 1034 (1) sentence 2 of the Code of Civil Procedure) and that the joined parties are to appoint one of these arbitrators in accordance with section 1035 (3) sentence 2 half-sentence 1 of the Code of Civil Procedure. This appointment is to be made jointly by the joined parties as stipulated by section 1035 (4) sentence 1 of the present draft bill. Thus, they must come to an agreement as regards the appointment of the arbitrator.

Re Section 1035 (4) sentence 2 of the present draft bill

Section 1035 (4) sentence 2 of the present draft bill governs a case in which – contrary to the stipulation made in sentence 1 – the joined parties fail to jointly appoint the arbitrator whose appointment is incumbent on them. In similar fashion as is done in section 1035 (3) sentence 3 of the Code of Civil Procedure, it is stipulated for this scenario that the other party may request the joined parties to make the appointment of an arbitrator that is incumbent on said joined parties. In this context, the term “other party” was chosen for reasons of linguistic simplicity and always includes the entire other side even if it not consists of only one party but also of multiple parties. By contrast, an opportunity also for one of the joined parties to make such a request was not to be provided for since, as a rule, it reasonably can be expected of the joined parties making up the claimant’s side to come to an agreement regarding the appointment of an arbitrator and since, in the case of the respondent’s side consisting of joined parties, the claimant’s side already has a fundamental vested interest in requesting the joined parties making up the respondent’s side to jointly make the appointment.

If the joined parties fail to comply with their obligation to jointly appoint an arbitrator within one month following receipt of the corresponding request to do so from the other party, then the other party may file a request with the court seeking to have the court appoint the arbitrator. The higher regional court has jurisdiction in this regard (section 1062 (1) number 1 of the Code of Civil Procedure).

Re Section 1035 (4) sentence 3 of the present draft bill

A fundamental issue entailed by the court appointment of an arbitrator who actually ought to be appointed by one of the sides in multi-party arbitral proceedings was the subject matter addressed by the *Dutco* decision (Cass. 1re civ., 07.01.1992, *Revue de l’arbitrage* 1992, 470) issued by the French court of cassation (*cour de cassation*). In its ruling, the court of cassation took the view that the principle of equality of the parties called not only for that arbitrator to be appointed by the court who actually would have had to be appointed by the joined parties who were unable to reach agreement – instead, the court held, it meant that all members of the arbitral tribunal had to be appointed by the court in such a case. The reason, the court held, was that otherwise, the influence that one side could exert on the composition of the arbitral tribunal would be greater than that of the other side.

This French solution regarding the court appointment of the entire arbitral tribunal sometimes is referred to as the “overall solution” and is contrasted with the contrary solution, according to which only that arbitrator is to be appointed by the court who ought to have been appointed by the joined parties who failed to reach agreement (“individual solution;” cf. *Münch*, ZZPInt 23 [2018], 259 [290–292]). Like some institutional arbitration rules and, for example, Swiss law (Article 362 (2) of the Swiss Code of Civil Procedure or Article 179 (5) of the Swiss Federal Act on Private International Law, respectively), section 1035 (4) sentence 3 of the present draft bill strikes a balance between these two solutions and grants judicial discretion to the competent court (“may […] assume the task”) insofar as it can decide either to appoint solely the arbitrator whose appointment is incumbent on the side failing to reach agreement or to likewise appoint the arbitrator whose appointment is incumbent on the other side. In this way, the court may exercise discretion in taking the

decision of whether to regard the refusal by the joined parties to jointly appoint an arbitrator as procedural tactics more than anything else; in such a case, the court as a rule will appoint only the arbitrator whom the joined parties who have failed to reach agreement ought to have appointed. By contrast, if the joined parties truly have conflicting interests that prevent them from making a joint appointment, then the appointment by the court of an arbitrator whose appointment actually is incumbent on the opposing side is an available option (cf. *Münch*, ZZPInt 23 [2018], 259 [290–292]; *G. Wagner*, *Rechtsstandort Deutschland im Wettbewerb*, 2017, p. 157–163).

That said, section 1035 (4) sentence 3 of the present draft bill is structured such that it offers solely the opportunity to the court to make an appointment, based on its judicial discretion and as a matter of reciprocity, with a view to each arbitrator not jointly appointed by the joined parties, also of an arbitrator whose appointment would have been incumbent on the other party. This means, where the concept of arbitral proceedings with three arbitrators is concerned (sections 1034 (1) sentence 2, 1035 (3) sentence 2 of the Code of Civil Procedure), that the court may only appoint the two arbitrators whose appointment actually would have been incumbent on the parties, but may not additionally appoint the presiding arbitrator of the arbitral tribunal. No need was regarded to exist for opening up a corresponding opportunity for the court to appoint the presiding arbitrator as well because section 1035 (3) sentence 2 of the Code of Civil Procedure stipulates that the two arbitrators who ought to be appointed by the parties are to appoint the presiding arbitrator. This shall also apply if the court appoints one or both of the other arbitrators. Where the two arbitrators are unable to reach agreement regarding the arbitrator who is to serve as presiding arbitrator, section 1035 (3) sentence 3 of the Code of Civil Procedure already offers the possibility of the court appointing that arbitrator under current law.

Re Section 1035 (4) sentence 4 of the present draft bill

If the court exercises its judicial discretion such that, after having heard the other party, it also appoints an arbitrator whose appointment actually is incumbent on that party, section 1035 (4) sentence 4 of the present draft bill provides for the case that said other party previously already had appointed an arbitrator. For this case, section 1035 (4) sentence 4 of the present draft bill stipulates that the mandate of the arbitrator already appointed by the party ends upon the appointment of an arbitrator by the court.

Re lit. b (section 1035 (5) and (6) of the present draft bill)

Since section 1035 (4) of the present draft bill ties in, in terms of the structure of the legal system, with section 1035 (3) of the Code of Civil Procedure, the subsections previously numbered (4) and (5) of this provision were to be moved up numerically.

Re Number 6 (section 1040 (4) of the present draft bill)

Section 1040 (4) of the present draft bill serves to address an instance in which the existing system of court relief has remained silent in arbitration matters. To date, the parties involved in arbitral proceedings did not have the possibility of having a court review negative decisions taken by an arbitral tribunal concerning its jurisdiction. For this reason, scholarly literature repeatedly has called for the existing possibility of having decisions reviewed by a court in which the arbitral tribunal declares itself positively to have jurisdiction to be supplemented by way of provisions being introduced that allow the court to likewise review negative decisions by an arbitral tribunal concerning its jurisdiction (*Münch*, ZZPInt 23 [2018], 259 [286–288]; *Raeschke-Kessler*, *Festschrift für Siegfried H. Elsing*, 2015, p. 433 [440 et seq.]; *Wagner*, *Rechtsstandort Deutschland im Wettbewerb*, 2017, p. 154–157; a different view is taken by *Wolff*, SchiedsVZ 2016, 293 [303 et seq.]). This is addressed by section 1040 (4) of the present draft bill. In doing so, German law is also following the model set by international law: For example, Austrian law provides, in section 611 (2) number 1 of

the Austrian Code of Civil Procedure, that an arbitral award is to be set aside “if the arbitral tribunal has denied its jurisdiction, but a valid arbitration agreement is present.”

The background for the opportunity not being available thus far to have the court review negative decisions on jurisdiction is the fact that these decisions are generally taken by way of a procedural award. The term “procedural award” means that the arbitral tribunal does not rule on the merits of the case and instead concludes in the context of reviewing whether the arbitration claim is admissible, that it lacks jurisdiction to rule on the merits of the matter. In the case of domestic procedural awards – as is the case for all arbitral awards – the only means available consists of having the court set aside the award in accordance with section 1059 of the Code of Civil Procedure. However, the sole grounds available for setting aside an arbitral award pertaining to the arbitral tribunal’s jurisdiction as set out in section 1059 (2) number 1 (a) and (c) of the Code of Civil Procedure relate to the arbitration agreement not being valid or the arbitral award dealing with a dispute not covered by the arbitration agreement. By contrast, section 1059 (2) of the Code of Civil Procedure does not provide for a procedural award to be set aside for the reason that actually, the arbitration agreement in fact is effective and the dispute before the arbitral tribunal also is covered by its terms. In this case, the Federal Court of Justice did not see a possibility to apply section 1059 (2) of the Code of Civil Procedure, neither directly nor by analogy, to cases in which an arbitral tribunal had declared itself to lack jurisdiction without such declaration being justified (Federal Court of Justice, court order of 6 June 2002 – III ZB 44/01, NJW 2002, 3031 [3032] = BGHZ 151, 79).

Re Section 1040 (4) sentence 1 of the present draft bill

Section 1040 (4) sentence 1 of the present draft bill supplements section 1040 (3) sentence 1 of the Code of Civil Procedure, but does so in the opposite direction: While section 1040 (3) sentence 1 of the Code of Civil Procedure clarifies which decision an arbitral tribunal generally has to take if, following an objection raised in accordance with section 1040 (2) of the Code of Civil Procedure, it considers itself to have jurisdiction, section 1040 (4) sentence 1 of the present draft bill provides clarity on the form of the decision that an arbitral tribunal generally has to take if, upon a corresponding objection having been raised, it considers itself to lack jurisdiction. In line with the existing case law (Federal Court of Justice, court order of 6 June 2002 – III ZB 44/01, NJW 2002, 3031 et seq. = BGHZ 151, 79; Higher Regional Court of Frankfurt am Main, court order of 17 January 2013 – 26 Sch 24/12, SchiedsVZ 2013, 341 [342 et seq.]) and with the prevailing view in scholarly literature (Zöller/*Geimer*, 34th edition 2022, commentary on section 1040 of the Code of Civil Procedure at margin number 11; *Münchener Kommentar zur ZPO*/*Münch*, 6th edition 2022, commentary on section 1040 of the Code of Civil Procedure at margin number 31; a different view is taken by Musielak/Voit/*Voit*, 20th edition 2023, commentary on section 1040 of the Code of Civil Procedure at margin number 8 [termination of the proceedings by order as defined in section 1056 (2) number 3 of the Code of Civil Procedure]), the arbitral tribunal as a rule is to issue a procedural award in these cases.

An objective reason for affording the possibility to the arbitral tribunal to issue a procedural award despite the fact that – at least in the view taken by the arbitral tribunal – the subject matter of the dispute is not covered by an effective arbitration agreement, is given by the competence assigned to the arbitral tribunal by section 1040 (1) sentence 1 of the Code of Civil Procedure to rule (at least provisionally) on its own jurisdiction (cf. order issued by the Federal Court of Justice on 6 June 2002 – III ZB 44/01, NJW 2002, 3031 et seq. = BGHZ 151, 79).

In order to deal with exceptional situations that do not allow a procedural award to be issued and that need to be settled by an arbitral tribunal in some other manner – for example by issuing an order declaring the termination of the arbitral proceedings by analogous

application of section 1056 (2) of the Code of Civil Procedure –, section 1040 (4) sentence 1 of the present draft bill maintains the rule that the decision is to be taken by issuing a procedural award. This allows the arbitrators some flexibility in dealing with any special scenarios that may arise. The reason is that the procedural award denying jurisdiction likewise can have a binding effect according to section 1055 of the Code of Civil Procedure (Federal Court of Justice, court order of 6 May 2021 – I ZB 71/20, BeckRS 2021, 15389 at margin number 16).

The connection created by the language used in section 1040 (4) sentence 1 of the present draft bill with the objection raised as to the arbitral tribunal lacking jurisdiction according to section 1040 (2) of the Code of Civil Procedure only serves as an indication of which rules are to be followed in the proceedings following a corresponding objection if the arbitral tribunal considers itself to lack jurisdiction. Even if no objection in accordance with said provision is raised, an arbitral tribunal that considers itself to lack jurisdiction despite no such objection having been raised, which possibly could entail preclusion, is free to declare itself to lack jurisdiction by issuing a procedural award.

Re Section 1040 (4) sentence 2 of the present draft bill

Since a procedural award denying an arbitral tribunal's jurisdiction also constitutes a regular arbitral award terminating the proceedings, an application to have it set aside as provided for in section 1059 of the Code of Civil Procedure is an available legal remedy (Federal Court of Justice, court order of 6 June 2002 – III ZB 44/01, NJW 2002, 3031 et seq. = BGHZ 151, 79). As elaborated above, the grounds set out in section 1059 (2) of the Code of Civil Procedure for setting aside an arbitral award do not yet offer the possibility to set aside a procedural award on the grounds that the arbitral tribunal wrongly considered itself to lack jurisdiction.

Against this backdrop, section 1040 (4) sentence 2 of the present draft bill establishes a new ground for setting aside a procedural award that supplements the grounds for setting aside the award already set out in section 1059 (2) of the present draft bill. If a party files an application seeking to have a procedural award set aside, then the court is to review, besides the grounds for setting aside an arbitral award listed in section 1059 (2) of the Code of Civil Procedure, whether the arbitral tribunal in fact lacked jurisdiction to decide on the merits of the dispute. This is the case in particular where the court rules that the arbitration agreement is ineffective or, despite being effective, does not cover the subject matter of the dispute before the arbitral tribunal. In this context, the wording used in section 1040 (4) sentence 2 of the present draft bill corresponds to that of section 1059 (2) number 1 of the Code of Civil Procedure.

Since section 1059 of the Code of Civil Procedure is based on Article 34 of the UNCITRAL Model Law and since it is not intended to create the impression that, in substance, new grounds for setting aside arbitral awards are being created under German law, but rather – on the contrary – to improve access to arbitral tribunals, this ground for setting aside an arbitral award was not added to section 1059 (2) number 1 of the Code of Civil Procedure (as suggested by *Münch*, ZZPInt 23 [2018], 259 [288]), and instead was placed in the regulatory context of section 1040 of the present draft bill. The reason is that section 1040 of the Code of Civil Procedure sets out the means available for contesting a decision in court that was issued by an arbitral tribunal concerning its jurisdiction, beyond the arbitral awards on the merits. As a consequence, section 1059 (1) of the present draft bill was to be supplemented by a reference to section 1040 (4) sentence 2 of the present draft bill in order to underline the connection between the two provisions and to enhance legal certainty.

Since section 1040 (4) sentence 2 of the present draft bill adds only one ground for setting aside an arbitral award, the request seeking to have a procedural award set aside by a court

continues to be governed, in its entirety, by section 1059 of the Code of Civil Procedure. Thus, where appropriate, the court also can refer the matter back to the arbitral tribunal, setting aside the procedural award, upon a party's request (section 1059 (4) of the Code of Civil Procedure). Likewise, if a procedural award is set aside, this will have the consequence, in cases of doubt, that the arbitration agreement once again enters into force where the subject matter of the dispute is concerned (section 1059 (5) of the Code of Civil Procedure) – the reason being that the fact of the subject matter of the dispute bindingly being subject to arbitration precisely has been positively decided by the procedural award having been set aside.

Since the procedural award constitutes a regular arbitral award terminating the proceedings, the time limit stipulated in section 1059 (3) of the Code of Civil Procedure also applies to the application to have an arbitral award set aside. The fact that, as a consequence, time limits of different lengths apply to the contestation before a court of positive interlocutory decisions (one month after having received the written notice of the interlocutory decision) and negative procedural awards (three months following receipt of the arbitral award) is justified by the different legal quality of the two forms of decision. Otherwise, different time limits would apply for challenging procedural awards, depending on the ground for annulment.

Re Number 7 (section 1041 (2) of the present draft bill)

Section 1041 (2) of the present draft bill clarifies as to when an interim measure issued by an arbitral tribunal may be enforced within Germany. Systematically, the permission of enforcement of an interim measure corresponds to the declaration of enforceability of an arbitral award. Without the court's permission of enforcement, there will be no state enforcement of an interim measure .

Since the amendment of section 1025 (2) of the present draft bill clarifies that interim measures issued by foreign arbitral tribunals also may be the subject of state enforcement within Germany by way of a domestic court order permitting enforcement, this is taken as an occasion to give clearer wording to the provision governing the procedure for the court order permitting enforcement. In particular, it is clarified when an application to permit enforcement is to be dismissed. Concurrently, the existing judicial discretion under section 1041 (2) sentence 1 of the Code of Civil Procedure is removed. In reviewing the grounds based on which the application to permit enforcement is to be dismissed, the court is to have regard to the summary nature of the expedited proceedings.

By contrast, no need was seen to put in place provisions for a court procedure for terminating interim measures , beyond the dismissal of the application to permit enforcement. The reason is that, other than is the case for arbitral awards, these measures do not have a substantive res judicata effect within the meaning of section 1055 of the Code of Civil Procedure (*Münchener Kommentar zur ZPO*/*Münch*, 6th edition 2022, commentary on section 1055 of the Code of Civil Procedure at margin number 7). Thus, there is no urgent need for a court to terminate interim measures that cannot be enforced due to the fact that no permission of enforcement having been granted.

The provisions of Articles 17 to 17 J of the UNCITRAL Model Law, revised in 2006, that relate to interim measures issued by an arbitral tribunal were included in the considerations for the reform. However, to the exception of Article 17 I of the UNCITRAL Model Law – the provisions of which were taken into account in drafting section 1041 (2) of the present draft bill – no need was seen to amend the existing law on their basis (an opinion shared by *Raeschke-Kessler*, *Festschrift für Siegfried H. Elsing*, 2015, p. 433 [437 et seq., 443]).

Re Section 1041 (2) sentence 1 of the present draft bill

The current section 1041 (2) sentence 1 of the Code of Civil Procedure is divided. Its first half-sentence becomes section 1041 (2) sentence 1 of the present draft bill.

Thus far, section 1041 (2) sentence 1 of the Code of Civil Procedure provided that it was possible for the state court, in duly exercising its discretion, to permit enforcement ("may permit") (Bundestag printed paper 13/5274, p. 45). Now that section 1041 (2) sentence 3 of the present draft bill is introduced, this no longer needs to be upheld since the grounds on which an application to permit enforcement is to be dismissed have been stated conclusively in section 1041 (2) sentence 3 of the present draft bill (cf. Article 17 I (1) of the UNCITRAL Model Law) and no review of the substance of the interim measures issued by the arbitral tribunal is to be performed (cf. Article 17 I (2) of the UNCITRAL Model Law). As a consequence, the prohibition of a *révision au fond* also applies to interim measures issued by an arbitral tribunal.

For reasons of preserving the systematic structure of the law, the current second half-sentence of section 1041 (2) sentence 1 of the Code of Civil Procedure becomes section 1041 (2) sentence 3 number 2 of the present draft bill.

Re Section 1041 (2) sentence 2 of the present draft bill

Section 1041 (2) sentence 2 of the present draft bill corresponds to the existing section 1041 (2) sentence 2 of the Code of Civil Procedure, whereby the minor adjustments made to its language do not impinge on its substance. The provision still allows the state court to recast the measure issued by the arbitral tribunal insofar as this is necessary, with regard to German law governing the compulsory enforcement of court judgments, in order to ensure its enforceability (cf. Bundestag printed paper 13/5274, p. 45). In future, this provision will gain in importance in particular with a view to measures taken by foreign arbitral tribunals since in many cases, these measures first will have to be restructured to fit in with the typology of the German law governing compulsory enforcement.

Re Section 1041 (2) sentence 3 of the present draft bill

Section 1041 (2) sentence 3 of the present draft bill is based on Article 17 I (1) of the UNCITRAL Model Law in the revised version from 2006. For the first time, the grounds are stated in the German arbitration law that will lead to a dismissal of the application for permission of enforcement. The reason for this amendment is not only the reform of the Model Law, but also the fact that clarity now has been provided, by section 1025 (2) of the present draft bill, that the interim measures issued by foreign arbitral tribunals also may be permitted to be enforced domestically. As a consequence, the law must determine the grounds based on which an application to permit enforcement is to be dismissed. Following Article 17 I (1) of the UNCITRAL Model Law, it was concurrently provided that a request according to section 1041 (2) sentence 1 of the present draft bill may be dismissed only in those cases in which a reason set out in section 1041 (2) sentence 3 of the present draft bill exists.

Terminologically, section 1041 (2) sentence 2 of the present draft bill uses the term "dismissal" of applications since this is the wording usually used in the law governing seizure and injunctions (sections 916 et seqq. of the Code of Civil Procedure); cf. section 922 (3) of the Code of Civil Procedure.

Re Section 1041 (2) sentence 3 number 1 of the present draft bill

The language used in drafting section 1041 (2) sentence 3 number 1 of the present draft bill is aligned with that of section 1060 (2) sentence 1 of the Code of Civil Procedure, which

is the parallel provision for arbitral awards. As is the case in Article 17 I (1) (a) (i) and (b) (ii) of the UNCITRAL Model Law, section 1041 (2) sentence 3 number 1 of the present draft bill moves the grounds for setting aside an arbitral award away from the field of arbitral awards, placing them with the grounds leading to the dismissal of the application for permission of enforcement. Other than is the case in Article 17 I (1) of the UNCITRAL Model Law, it was possible to refer to all grounds for setting aside an arbitral award set out in section 1059 (2) of the Code of Civil Procedure because Article 36 (1) (a) (v) of the UNCITRAL Model Law, which Article 17 I (1) of the UNCITRAL Model Law does not reference, is not mentioned in section 1059 (2) of the Code of Civil Procedure.

Thus, an application to permit enforcement is to be dismissed in particular if the arbitration agreement was ineffective (section 1059 (2) number 1 (a) alternative 2 of the Code of Civil Procedure), if one of the parties subjectively did not have the capacity to submit to arbitration (section 1059 (2) number 1 (a) alternative 1 of the Code of Civil Procedure), if it was not possible to assert means of attack or defence in the context of the measure (section 1059 (2) number 1 (b) of the Code of Civil Procedure), if the subject matter of the dispute was not covered by the terms of the arbitration clause (section 1059 (2) number 1 (c) of the Code of Civil Procedure) or if the formation of the arbitral tribunal or the conduct of the arbitral proceedings was not lawful and this had an effect on the order directing the measure (section 1059 (2) number 1 (d) of the Code of Civil Procedure). The request furthermore is to be dismissed if the subject matter of the dispute objectively was not capable of settlement by arbitration (section 1059 (2) number 2 (a) of the Code of Civil Procedure) or if permitting enforcement of the measure would lead to a result that is contrary to public policy (ordre public) (section 1059 (2) number 2 (b) of the Code of Civil Procedure). The latter will have to be reviewed in greater detail in particular in the case of interim measures issued by foreign arbitral tribunals where they order measures that differ fundamentally and profoundly from the measures available under German law.

Re Section 1041 (2) sentence 3 number 2 of the present draft bill

Furthermore, an application to permit enforcement is to be dismissed under section 1041 (2) sentence 3 number 2 of the present draft bill if a corresponding interim measure already has been sought from a domestic court. Thus, section 1041 (2) sentence 3 number 2 of the present draft bill replaces section 1041 (2) sentence 1 second half-sentence of the Code of Civil Procedure. In terms of substance, all that is done with regard to the existing law is to clarify that only applications filed with domestic courts are to be taken into account. Where interim measures have been sought from foreign courts, this is irrelevant for section 1041 (2) sentence 3 number 2 of the present draft bill.

Re Section 1041 (2) sentence 3 number 3 of the present draft bill

Section 1041 (2) sentence 3 number 3 of the present draft bill corresponds to Article 17 I (1) (a) (ii) of the UNCITRAL Model Law. Under section 1041 (1) sentence 2 of the Code of Civil Procedure, an arbitral tribunal may require reasonable security to be provided in connection with an interim measure being issued. Section 1041 (2) sentence 3 number 3 of the present draft bill serves the enforcement of this requirement by the arbitral tribunal. If the security so required has not been provided, the application to permit enforcement must be dismissed.

Re Section 1041 (2) sentence 3 number 4 of the present draft bill

Section 1041 (2) sentence 3 number 4 of the present draft bill likewise has its origins in the UNCITRAL Model Law. As stipulated in Article 17 I (1) (a) (iii) of the UNCITRAL Model Law, the application to permit enforcement is to be dismissed if the interim measure has been terminated or suspended by the arbitral tribunal. By contrast, what was not included in the draft bill is the reason for dismissing the request of a state court at the place of arbitration

having terminated or suspended the interim measure. In this regard, the intention was to not get ahead of the discussion of the issue still ongoing with regard to arbitral awards (Federal Court of Justice, court order of 21 May 2008 – III ZB 14/07, NJW 2008, 2718 at margin number 8 with a note by *Wolff*, *Kommentierte BGH-Rechtsprechung Lindenmaier/Möhring*, (LMK, Lindenmaier/Möhring (eds.), Annotated Rulings of the German Federal Court of Justice) 2008, 265473), particularly since, in all likelihood, the corresponding scenarios will occur only rarely where interim measures issued by arbitral tribunals are concerned.

Re Section 1041 (2) sentence 4 of the present draft bill

The new section 1041 (2) sentence 4 first half-sentence of the present draft bill is adapted from section 1060 (2) sentence 1 of the Code of Civil Procedure. If, in the case of domestic arbitral awards, the application for a declaration of enforceability is to be dismissed while setting aside the arbitral award, then in the parallel scenario – the dismissal of an application to permit enforcement of an interim measure – this measure likewise is to be terminated.

Section 1041 (2) sentence 4 second half-sentence of the present draft bill is premised on the same concept where measures issued by foreign arbitral tribunals are concerned. In keeping with section 1061 (2) of the Code of Civil Procedure, the court is to establish by a declaratory ruling that the interim measure is not to be recognised in Germany.

Re Section 1041 (2) sentence 5 of the present draft bill

Section 1041 (2) sentence 5 of the present draft bill stipulates, by way of protecting judgment debtors, that the state court may make the permission of enforcement dependent, at its judicial discretion, upon security being provided also in those cases in which the arbitral tribunal itself had not required the provision of a reasonable security.

Re Section 1041 (2) sentence 6 of the present draft bill

Section 1041 (2) sentence 6 of the present draft bill creates a connection to the aspects of the permission of enforcement that are governed by procedural law. According to section 1041 (2) sentence 6 first half-sentence of the present draft bill, the order issuing the interim measure or a certified copy thereof must be submitted together with the application to permit enforcement (by analogous application of section 1064 (1) sentence 1 of the Code of Civil Procedure), whereby the certification also may be performed by counsel authorised to represent the party before the court in the proceedings in which permission for the enforcement of a measure is sought (by analogous application of section 1064 (1) sentence 2 of the Code of Civil Procedure). In keeping with the concept underpinning the procedure for seizures and injunctions (sections 916 et seqq. of the Code of Civil Procedure), factual allegations are to be demonstrated to the satisfaction of the court in all other cases within the meaning of section 294 of the Code of Civil Procedure (cf. section 920 (2) of the Code of Civil Procedure).

Re Number 8 (section 1047 of the present draft bill)

Re lit. a (section 1047 (2) and (3) of the present draft bill)

Re Section 1047 (2) sentence 1 of the present draft bill

Section 1047 (2) sentence 1 of the present draft bill picks up on the rapidly progressing digitalisation of procedural law and expressly clarifies that an arbitral tribunal can decide at its own discretion whether it intends to conduct the oral hearing not as a traditional in-person hearing and instead using image and sound transmission (video hearing). In this context, the term “hearing for oral argument” is to be understood broadly and comprises, for

example, also the taking of evidence by the arbitral tribunal (section 1042 (4) sentence 2 of the Code of Civil Procedure). The term “video hearing” is aligned with that of the definition in section 128a (1) sentence 2 of Code of Civil Procedure in its draft version, which does not apply in arbitral proceedings.

The arbitral tribunal may hold an oral hearing either in person or as a video hearing, in which context it is free to permit a witness to be examined by way of a video hearing held in the course of an in-person hearing, and likewise is free to hold individual oral hearings in-person and to conduct other hearings as a video hearing. Moreover, an arbitral tribunal consisting of several arbitrators is free to have its members attend the proceedings at one and the same location or from different locations.

Arbitration law does not provide for a right of the parties to have a hearing conducted in person (on the research project conducted by the International Council for Commercial Arbitration (ICCA) in 78 jurisdictions, see *Krapfl/Ebert*, *COVID-19 und Recht* (COVuR, Journal on COVID 19 and the Law) 2022, 640 [640] and *Scherer/Jensen*, *Digitalisierung und Zivilverfahren* (Digitalisation and Civil Proceedings), 2023, p. 591 [610]). On the contrary, arbitral tribunals may override the objection raised by a party, exercising their procedural discretion, and order that a video hearing be held (*Scherer/Jensen*, *Digitalisierung und Zivilverfahren*, 2023, p. 591 [610]). In exercising its discretion as provided for in section 1047 (2) sentence 1 of the present draft bill, the arbitral tribunal in particular is to balance the right to be heard of the opposing party with the other party’s right to access to justice (cf. the court order issued by the Austrian Supreme Court of Justice (*Oberster Gerichtshof*) on 23 July 2020 – 18ONc 3/20s, SchiedsVZ 2021, 163 at margin number 55). In addition, questions of climate neutrality, the substance of the arbitral proceedings concerned, as well as the obligation of the arbitral tribunal to conduct proceedings in an efficient manner also may play a role. Aspects of efficiency may be relevant in particular in circumstances such as those of the COVID-19 pandemic, during which it was impossible for a period of time to conduct in-person hearings (Anders/Gehle/*Anders*, Commentary on the Code of Civil Procedure, 81st edition 2023, commentary on section 1047 at margin number 4)

As stipulated in section 1047 (3) of the present draft bill, the parties are to be given sufficient advance notice of the decision to conduct an oral hearing as a video hearing.

Re Section 1047 (2) sentence 2 of the present draft bill

Party autonomy in arbitral proceedings is underlined by section 1047 (2) sentence 2 of the present draft bill. According to this provision, the parties are free to stipulate binding requirements for the arbitral tribunal concerning the manner in which the oral hearing is to be conducted. Thus, the parties are free to determine, either by way of an individual arrangement or by including by reference certain institutional arbitration rules, whether the oral hearing is to be held in-person or by way of a video hearing, for example.

On the basis of section 1042 (3) of the Code of Civil Procedure read in conjunction with section 1047 (2) sentence 2 of the present draft bill, the parties likewise are free to determine the details of how an oral hearing in arbitral proceedings by way of a video hearing is to be conducted and to make arrangements, for example, as regards its recording.

Re 1047 (3) of the present draft bill

Where the court determines, after having heard the parties and exercising its discretion in accordance with section 1047 (2) sentence 1 of the present draft bill, that a video hearing is to be held, the provision has been supplemented by section 1047 (3) of the present draft bill such that the parties now are to be given sufficient advance notice of this fact. If the oral

hearing is held as a video hearing, then the parties and the arbitral tribunal will usually prepare a virtual hearing protocol which determines all (technical) details relating to the conduct of the oral hearing as a video hearing.

Re lit. b (section 1047 (4) of the present draft bill)

As a consequence of introducing section 1047 (2) of the present draft bill, the current section 1047 (3) of the Code of Civil Procedure was to be moved up numerically.

Re Number 9 (section 1054 of the present draft bill)

Re lit. a (section 1054 (2) of the present draft bill)

Section 1054 (1) of the Code of Civil Procedure is premised on the concept of the arbitral award being set out in a document containing the arbitrators personal and wet-ink signatures (Higher Regional Court of Munich, court order of 25 February 2013 – 34 Sch 12/12, SchiedsVZ 2013, 230 [233]). By way of taking account of the increasing digitalisation of procedural law, however, it is intended, by introducing section 1054 (2) of the present draft bill, to allow for an arbitral award to also be part of an electronic document. In this way, arbitral awards are treated the same way as judgments and orders issued by courts (section 130b sentence 1 of the Code of Civil Procedure; *Münchener Kommentar zur ZPO*/*Fritsche*, 6th edition 2020, commentary on section 130b of the Code of Civil Procedure at margin number 2). A number of other jurisdictions likewise have provided for the possibility to issue an arbitral award in electronic form (as has been done, for example, by Article 1072 of the Dutch Code of Civil Procedure and Article 41 (6) of the Federal Law on Arbitration (2018) of the United Arab Emirates; on this, see *Scherer/Jensen*, *Digitalisierung und Zivilverfahren*, 2023, p. 591 [620 et seq.]). Provided no party objects (section 1054 (2) of the present draft bill), an arbitral tribunal is free to decide at its discretion (section 1052 (1) of the Code of Civil Procedure) whether to issue the arbitral award as provided for in section 1054 (1) of the Code of Civil Procedure or in accordance with subsection (2) of the present draft bill.

A requirement is that the names of all members of the arbitral tribunal are included at the end of the arbitral award and that each member is to affix their qualified electronic signature to the arbitral award. In this context, the term “member of the arbitral tribunal” has been chosen solely for linguistic reasons; it is intended to include not only each arbitrator of a multi-member arbitral tribunal, but also the sole arbitrator. The term “qualified electronic signature” is defined in Article 3 number 12 of Regulation (EU) No. 910/2014 of the European Parliament and of the Council of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC, as amended. As a consequence, the requirements set out therein must be met.

Other than is the case in section 130b sentence 1 of the Code of Civil Procedure, section 1054 (2) of the present draft bill provides the opportunity to each party to object. If a party so objects, then the arbitral tribunal must issue the arbitral award as a physical record as stipulated in section 1054 (1) of the Code of Civil Procedure. In this way, each party is to be afforded the opportunity to refer the arbitral tribunal to the issuance of the arbitral award in the form required under section 1054 (1) sentence 1 of the Code of Civil Procedure. Not only does this serve to strengthen the party autonomy, it in particular is intended to ensure that it is possible for the parties to obtain the international declaration of enforceability on the basis of an arbitral award issued in this manner, which, depending on the circumstances, may be easier. The reason is that it seems quite conceivable that obtaining a declaration of enforceability of an arbitral award made in the form defined in section 1054 (2) of the present draft bill will not be as straightforward in some foreign jurisdictions as this is the case for arbitral awards issued in the traditional manner, or that arbitral awards made in this form will not be recognised at all if they do not meet the form

requirements that apply under the law of the state of enforcement. The New York Convention has remained silent as to which form requirements the original document is to meet and likewise has not defined which law governs said requirements (*Scherer/Jensen*, *Digitalisierung und Zivilverfahren*, 2023, p. 591 [620]). In order to effectively structure the right of the parties to raise an objection, the arbitral tribunal has to ensure that the parties are heard before the arbitral award is issued.

Re lit. b (section 1054 (3) and (4) of the present draft bill)

As a consequence of section 1054 (2) of the present draft bill being inserted, the existing subsections (2) and (3) were to be moved up numerically.

Re lit. c (section 1054 (5) of the present draft bill)

The Act on the Use of Electronic Forms of Communication in the Justice System (*Gesetz über die Verwendung elektronischer Kommunikationsformen in der Justiz*) of 29 March 2005 (published in the Federal Law Gazette I p. 837, 2022) replaced the word “send” in section 1054 of the Code of Civil Procedure by the word “deliver” in order to also cover electronic forms of transmission (Bundestag printed paper 15/4067, p. 36). Inasmuch, section 1054 (5) of the present draft bill only needed to be adjusted to reflect the fact that the personal, wet-ink signature no longer is required in all cases in order to allow an arbitral award to be delivered in accordance with the electronic form defined in section 1054 (2) of the present draft bill. Thus, the requirement of delivery stipulated in section 1054 (5) of the present draft bill will be met in future also in those cases in which the arbitral award delivered is not an arbitral award bearing a signature, and instead one that complies with the form requirements set out in section 1054 (2) of the present draft bill.

Re Number 10 (sections 1054a and 1054b of the present draft bill)

Re Section 1054a of the present draft bill

In its explanatory memorandum to the Act on the Revision of Arbitration Law, the government stated that while the “question of whether or not a concurring or dissenting opinion may be added to the arbitral award […] does not need to be provided for expressly,” this was “regarded for the most part as admissible” where “the law as it stands is concerned” (Bundestag printed paper 13/5274 p. 56). Since the admissibility of arbitrators issuing concurring or dissenting opinions is still highly controversial for arbitrations seated in Germany (cf., as only a few examples from recent years, *Escher*, SchiedsVZ 2018, 219; *Hochstrasser/Sunaric*, SchiedsVZ 2021, 35; *Münchener Kommentar zur ZPO*/*Münch*, 6th edition 2022, commentary on section 1054 at margin number 24 et seq.; *Risse/Altenkirch*, *Betriebsberater* (BB, Journal for Operational Consultancy) 2020, 2818; *Schütze*, SchiedsVZ 2008, 10 [13 et seq.]; *Sessler/Russ*, SchiedsVZ 2020, 201; *Wegen/Barth/Wexler-Uhlich*, International Arbitration in Germany, 2022, Chapter 7 at margin number 20 et seqq.; *Westermann*, SchiedsVZ 2009, 102), the intention is to now clarify for the future that, in arbitral proceedings with more than one arbitrator, it is possible to submit a concurring or dissenting opinion also if the place of arbitration is in Germany. This is why, in future, arbitral awards with regard to which a concurring or dissenting opinion is submitted no longer will be subject to any concerns regarding their compliance with procedural public policy (ordre public) (section 1059 (2) number 2 (b) of the Code of Civil Procedure) (on the corresponding concerns, cf. the court order issued by the Higher Regional Court of Frankfurt am Main on 16 January 2020 – 26 Sch 14/18, BeckRS 2020, 4606 at margin number 206 [obiter dictum]; the issue is not conclusively addressed in the order issued by the Federal Court of Justice on 26 November 2020 – I ZB 11/20, BeckRS 2020, 39395 at margin number 41).

The decisions of an arbitral tribunal with more than one arbitrator that, according to section 1052 (1) of the Code of Civil Procedure, are to be taken by a majority of the votes of all members require prior deliberations (Federal Court of Justice, court order of 11 December

2014 – I ZB 23/14, NJW-RR 2015, 1087 at margin number 12). As a general rule, the principle of the secrecy of deliberations likewise governs deliberations by the arbitral tribunal, as was most recently held by the Federal Court of Justice in its decision of 2014 (Federal Court of Justice, court order of 11 December 2014 – I ZB 23/14, NJW-RR 2015, 1087 at margin number 15). However, the existence of the principle of the secrecy of deliberations does not mean that concurring or dissenting opinions cannot be permitted by law. The reason is that, strictly speaking, a violation of the principle of the secrecy of deliberations only occurs if insights are provided into the deliberation process (Salger/Trittmann/*Hanefeld/Nedden*, *Internationale Schiedsverfahren* (International Arbitration Proceedings), 2019, section 20 at margin number 35). The concurring or dissenting opinion as provided for in section 1054a of the present draft bill does not serve, however, to disclose the course of deliberations or their content; instead, it allows an arbitrator to put the reasons in writing for which they would have submitted an arbitral award with a different operating part or why they would have provided a different reasoning for the arbitral award issued with that operating part. This means that the impartiality and independence of the arbitrator is not affected if it is expressly allowed to submit concurring and dissenting opinions. Furthermore, it is to be considered that the principle of the secrecy of deliberations protects the judicial independence of the judges participating in the deliberations and their decision by maintaining the unity and anonymity of the panel. However, this protection is not accorded to the judges as individuals, it is accorded to the institution (*Schmidt-Räntsch*, *Deutsches Richtergesetz* (Commentary on the German Judiciary Act), 6th edition 2009, commentary on section 43 at margin number 7). The principle of the secrecy of deliberations is intended to protect the standing and authority of the judicial ruling and, concurrently, the authority of the formation of the state court issuing said ruling. However, arbitral tribunals are not acting in a sovereign capacity and do not claim any authority as a state or sovereign body. At the same time, the arbitrator does not hold a government office.

In arbitration proceedings, it is not uncommon for arbitrators with different actual experiences and a different legal background – possibly also rooted in different legal cultures or groups – to work together. This can result in a broad range of views in an arbitral tribunal. The fact that the law now expressly allows concurring and dissenting opinions means that an arbitrator who has not prevailed in the tribunal's deliberations nonetheless is able to express their deviating opinion and also is able to share this opinion with the parties. In this way, the quality of arbitral dispute resolution can be enhanced, while it is concurrently demonstrated to the parties, by informing them of the line of argument that did not achieve a majority, that the arbitral tribunal addressed also those aspects that, in the end, did not prevail in issuing the arbitral award. These aspects justify the express introduction of concurring and dissenting opinions in arbitration, which generally do not yet constitute part of German procedural law, apart from the Federal Constitutional Court (section 30 (2) of the Federal Constitutional Court Act (*Bundesverfassungsgerichtsgesetz* – BVerfGG)) and the majority of the *Land* constitutional courts (as an example, cf. section 22 (3) of the Hamburg Act on the Hamburg Constitutional Court (*Hamburger Gesetz über das Hamburgische Verfassungsgericht*)) (*Klatt*, *Das Sondervotum beim Bundesverfassungsgericht* (Concurring and Dissenting Opinions at the Federal Constitutional Court, 2023, p. 2 with footnote 5).

By contrast, the concurring and dissenting opinion is not a means for party-appointed arbitrators to demonstrate to that party that they have done their utmost to protect their interests. The reason is that the introduction of concurring and dissenting opinions does not change the duty of arbitrators to exercise their judicial role while maintaining independence both as concerns the subject matter of the dispute and the persons involved (on this duty, cf. the order issued by the Federal Court of Justice on 8 November 2018 – I ZB 21/18, NJW 2019, 857 at margin number 25). This applies without limitation also to the submission of concurring and dissenting opinions.

The introduction of section 1054a is not intended to turn the submission of a concurring or dissenting opinion into standard procedure. However, arbitrators are to have means available that allow them to state their concurring or dissenting opinion in scenarios in which their judicial discretion urges them to do so, without having to fear that this would give rise to the arbitral award being susceptible to being set aside.

Re Section 1054a (1) of the present draft bill

The wording used in section 1054a (1) first half-sentence of the present draft bill is aligned with that of section 30 (2) of the Federal Constitutional Court Act. As is the case there, issuing an opinion is possible both with regard to the result obtained in the decision ("dissenting opinion") and with regard to the reasons adduced for it ("concurring opinion"). However, it is possible to submit a concurring or dissenting opinion only if the respective arbitrator has stated already in the deliberations of the tribunal their deviating views; this applies both to the dissenting opinion and to the concurring opinion.

As a general rule, the parties have procedural autonomy over the arbitral proceedings. This is underlined by section 1054a (1) second half-sentence of the present draft bill where concurring and dissenting opinions are concerned. Accordingly, it is the parties who may stipulate whether or not concurring or dissenting opinions are to be submitted – in other words, they can either prohibit or allow them – and who may stipulate the modalities of their being submitted, for example by setting periods within which this is to be done.

Re Section 1054a (2) of the present draft bill

By section 1054a (2) of the present draft bill, it is incumbent on an arbitrator who wishes to express their deviating views in a concurring or dissenting opinion to inform the other members of the arbitral tribunal of their intention to do so as soon as the status reached in the deliberations allows. This provision is aligned with section 55 (2) of the rules of procedure of the Federal Constitutional Court. In other words, the respective arbitrator is obliged to state already in the deliberations that they intend to submit a concurring or dissenting opinion. This allows the other arbitrators to prepare at an early stage for the submission of a concurring or dissenting opinion.

Re Section 1054a (3) sentence 1 of the present draft bill

A concurring or dissenting opinion does not become part of the arbitral award, as is evident from section 1054a (3) sentence 1 of the present draft bill. Since arbitral awards and concurring or dissenting opinions are published only subject to the prerequisites set out in section 1054b of the present draft bill, it was not stipulated – other than is the case in section 30 (2) of the Federal Constitutional Court Act – that the concurring or dissenting opinion is to be appended to the arbitral award. The reason is that, in light of the fact that publication of the concurring or dissenting opinions is not required by law, they do not necessarily also serve the public discourse on the decision. For this reason, the concurring or dissenting opinion is completely separate from the arbitral award. At the same time, this separation of the concurring or dissenting opinion from the arbitral award ensures that delaying the submission of a concurring or dissenting opinion will not serve to achieve a delay in the issuance of the arbitral award. Rather, the arbitral award can be issued and delivered to the parties even if the concurring or dissenting opinion merely has been announced. In such a case, the concurring or dissenting opinion is to be delivered separately to the parties following the delivery of the arbitral award.

Re Section 1054a (3) sentence 2 of the present draft bill

Section 1054a (3) sentence 2 of the present draft bill does not reference section 1054 (1) sentence 1 of the Code of Civil Procedure in order to emphasise that the concurring or

dissenting opinion constitutes only the expression of one arbitrator's opinion and does not affect the final and binding arbitral award. For this reason, the concurring or dissenting opinion merely is to be made in writing and is not to be "issued," as would correspond to the language used in section 1054 (1) sentence 1 of the Code of Civil Procedure.

In order to underline the personal responsibility of an arbitrator, who is independent both as concerns the subject matter of the dispute and the persons involved, for the concurring or dissenting opinion they have submitted, the concurring or dissenting opinion also requires the wet-ink signature of this arbitrator unless sections 1054a (3) sentence 3, 1054 (2) of the present draft bill apply.

Re Section 1054a (3) sentence 3 of the present draft bill

Section 1054a (3) sentence 3 of the present draft bill calls for the application of section 1054 (2) to (5) of the present draft bill. Thus, as a general rule, the concurring or dissenting opinion signed by the arbitrator may form part of an electronic document that has been furnished with a qualified electronic signature as set out in section 1054 (2) of the present draft bill. The reasons on which the concurring or dissenting opinion is based are generally to be provided (section 1054 (3) of the present draft bill), the opinion must state the date on which it was submitted – and not the date on which the arbitral award was issued – and it must specify the place of arbitration; it is considered to have been submitted on the date specified and at that place (section 1054 (4) of the present draft bill). Moreover, the concurring or dissenting opinion made in compliance with the form requirements is to be delivered to each of the parties (section 1054 (5) of the present draft bill).

Re Section 1054b of the present draft bill

Re Section 1054b (1) sentence 1 of the present draft bill

In recent years, the legitimate demand for greater transparency in arbitration has grown both in the general public and amongst arbitral practitioners. This development has its origins particularly in investor-State arbitration, in which the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration have been enabling greater transparency since 2014. Likewise, commercial arbitration increasingly has been looking for ways to make arbitral proceedings more transparent without impinging on their confidentiality. One way to do so is to publish arbitral awards and any concurring or dissenting opinions that may be submitted. To cite but one example, the International Court of Arbitration of the International Chamber of Commerce (ICC) has been publishing arbitral awards since 2019, subject to certain prerequisites (cf. the Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration of 1 January 2021, at margin number 56 et seqq.), which include in particular the requirement that no party has objected to the publication. The arbitration rules of the Vienna International Arbitral Centre (VIAC) state that publication may be effected unless a party has objected to publication within 30 days upon receipt of the award (Article 41 of the VIAC Rules of Arbitration and Mediation 2021). In similar fashion, the arbitration rules of the German Arbitration Institute (DIS) provide for the publication of an arbitral award subject to the prior written consent of the parties (Article 44.3 sentence 2 of the 2018 DIS Arbitration Rules). Section 1054b (1) sentence 1 of the present draft bill ties in with this development.

Said provision is intended to contribute towards a more broadly applied practice of publication in arbitration. The background for this is to be seen in particular in the increasing criticism that legal disputes in some areas (for example disputes under corporate law, particularly post-M&A disputes, as well as disputes in the construction and energy sectors) frequently are dealt with in confidential arbitral proceedings, meaning that little legal development takes place in these areas. As a consequence, section 1054b (1) sentence 1 of the present draft bill takes account of the legitimate interest of the public to obtain

information on the development of the law by arbitral awards in a manner comparable to the obtainment of information on the development of the case law of the state courts. Some of the general considerations justifying the duty to publish court decisions (right to have access to justice, legal clarity and a functioning administration of justice) are also relevant for decisions issued by arbitral tribunals (*Kahlert*, SchiedsVZ 2023, 2 [10]). It is intended to allow in particular the professional public to access arbitral case law which in this way may contribute to providing greater clarity on the law and developing it further. The reason is that, by publishing arbitral awards, it is also possible to enable discussions within the scholarly community and to develop a coherent decision practice, which in turn would entail a greater degree of predictability and as a consequence greater legal clarity and certainty for the parties.

The interest of the public to obtain information and the interest to further develop the law on the one hand are opposed, on the other hand, by the interest of the parties in maintaining confidentiality and the personality rights of other persons involved in the proceedings (particularly witnesses and experts, for example). Section 1054b (1) sentence 1 of the present draft bill seeks to strike a balance between these conflicting interests by stipulating that the arbitral tribunal may, with the consent of the parties, publish the arbitral award and, if applicable, any concurring or dissenting opinions (section 1054a of the present draft bill) as a whole or in part, in anonymised or pseudonymised form, or it may initiate such a publication (this alternative concerns, for example, submitting the arbitral award to an academic journal). In this way, section 1054b (1) sentence 2 of the present draft bill protects the justified interests of the parties in maintaining confidentiality by tying the publication of the arbitral award to the consent of the parties. Each party is permitted to refuse consent, without needing to provide any reasons, to the intended publication of an arbitral award. Section 1054b (1) sentence 1 of the present draft bill does not stipulate any requirements as to the point in time at which consent is to be granted. Thus, it may be granted before the arbitral award has been issued or afterwards. In this context, the consent of the parties refers to the publication as such and not to its modalities. The provision assigns the decision as to the modalities to the arbitral tribunal. In this respect, section 1052 of the Code of Civil Procedure applies to the decision taken by the arbitral tribunal.

By including the phrase “as a whole or in part,” section 1054b (1) sentence 1 of the present draft bill indicates that publishing the entire arbitral award is an option, just as its publication in excerpts is. The publication of arbitral awards in excerpts in and of itself often is a suitable means of achieving greater transparency where the decisions are concerned, while at the same time protecting the interests of the parties and other persons involved in the proceedings in ensuring confidentiality (*Wimalasena*, *Die Veröffentlichung von Schiedssprüchen als Beitrag zur Normbildung* (The Publication of Arbitral Awards as a Contribution to the Formation of the Law, 2016, p. 301). A publication in excerpts could be structured such that those sections do not become part of the publication in which distinctive facts and circumstances are addressed or in which sensitive information is discussed, and which would allow conclusions to be drawn, either directly or indirectly, as to the identity of the parties or other persons involved in the proceedings and thus potentially pertain to business secrets or personality rights. It is possible also to only publish the reasons underpinning the decision.

Furthermore, the anonymisation or pseudonymisation of the arbitral award to be published that has been provided for in section 1054b (1) sentence 1 of the present draft bill is intended to ensure that legitimate interests of the parties in the confidentiality of the proceedings and personal rights of third parties are protected. By means of anonymisation and pseudonymisation, conclusions about the identity of the parties and of other persons involved in the proceedings can be effectively avoided.

Re Section 1054b (1) sentence 2 of the present draft bill

In connection with the requirement of consent stipulated in section 1054b (1) sentence 1 of the present draft bill, section 1054b (1) sentence 2 of the present draft bill introduces a legal fiction of consent. If the arbitral tribunal asks the parties to consent to a publication and a party does not refuse to grant such consent within one month of having received the corresponding request from the arbitral tribunal, then such consent is deemed to have been given by that party. The arbitral tribunal shall inform the parties of this legal consequence.

Section 222 of the Code of Civil Procedure applies to the determination of the time limit. No requirements are made with regard to the timing of the request for consent. Thus, it may be made before or after issuance of the arbitral award.

Re Section 1054b (2) of the present draft bill

Section 1054b (2) of the present draft bill clarifies that the parties may deviate from section 1054b (1) of the present draft bill. In practice, this will occur in particular by way of agreement on the application of such institutional arbitration rules of (cf. section 1042 (3) alternative 2 of the Code of Civil Procedure) that already set out provisions on the publication of arbitral awards. Thus, section 1054b (1) of the present draft bill does not restrict the existing efforts at institutions to publish arbitral awards.

It is also conceivable that the parties agree on additional requirements for publication, for example that, following its issuance, the arbitral award may be published only after a certain period of time has elapsed.

Re Section 1054b (3) of the present draft bill

Section 1054b (3) of the present draft bill emphasises that further-reaching legal requirements governing the publication of arbitral awards, as could result in individual cases, for example, from data protection law, the laws governing the protection of business secrets or the provisions protecting personality rights, are not affected by section 1054b of the present draft bill. Thus, the arbitral tribunal continues to be bound, when it takes a decision on the publication of the arbitral award and its modalities, by these legal regimes insofar as they stipulate requirements with regard to the arbitral award to be published. In particular with a view to data protection law, the General Data Protection Regulation is applicable both in domestic and international arbitral proceedings (on this, see *Fritz/Prantl/Leinwather/Hofer*, SchiedsVZ 2019, 301 et seqq., and Salger/Trittmann/*Müller*, *Internationale Schiedsverfahren*, 2019, section 4). As is the case for the publication of state court decisions, a version of the arbitral award to be published is to be prepared that is capable of being published and edited in order to safeguard data protection and the personality rights of the persons involved in the proceedings; this means, in particular, that a neutralised and anonymised or pseudonymised version, respectively, is created. Accordingly, while having due regard to aspects of data protection law, it is to be ensured that any personal data of other natural persons, in particular witnesses and experts, are excised from the arbitral award to be published. In this context, anonymisation that is legally compliant requires more than simply removing or redacting, respectively, names and addresses (*Wimalasena*, *Die Veröffentlichung von Schiedssprüchen als Beitrag zur Normbildung*, 2016, p. 305; *Fritz/Prantl/Leinwather/Hofer*, SchiedsVZ 2019, 301 [309]). Where there are any concerns that even an edited version of the arbitral award will not be able to ensure the protection of personality rights or of trade and business secrets, a publication is to be forgone in cases of doubt (*Eslami*, *Die Nichtöffentlichkeit des Schiedsverfahrens* (The Non-Public Nature of Arbitration Proceedings), 2016, p. 402 et seq.).

Re Number 11 (Heading of Book 10 Division 7 of the present draft bill)

The heading of Division 7 of Book 10 of the Code of Civil Procedure was to be adjusted since, by introducing section 1059a of the present draft bill, a ground for setting aside the arbitral award that thus far had formed part of section 1059 (2) number 2 (b) of the Code of Civil Procedure and section 826 of the Civil Code has been isolated from these provisions and has been codified as an independent legal remedy against the arbitral award.

Re Number 12 (section 1059 of the present draft bill)

Re lit. a (section 1059 (1) sentence 2 of the present draft bill)

Section 1059 of the Code of Civil Procedure provides for the principle of exclusivity and the principle of enumeration (*Münchener Kommentar zur ZPO*/*Münch*, 6th edition 2022, commentary on section 1059 of the Code of Civil Procedure at margin number 1 and 5). According to the principle of exclusivity, the application to have an arbitral award set aside generally constitutes the sole legal remedy that can be taken recourse to with the state courts against an arbitral award. The principle of enumeration states that, generally, an arbitral award may be set aside by a court only on the grounds set out in section 1059 (2) of the Code of Civil Procedure.

By appending section 1059 (1) sentence 2 of the present draft bill, the intention is, on the one hand, to indicate that a further ground for setting aside the arbitral award has been introduced in section 1040 (4) sentence 2 of the present draft bill, in other words an exception from the principle of enumeration of section 1059 (2) of the Code of Civil Procedure. Since this new ground for setting aside procedural awards serves the enforcement of the existing exclusivity of arbitration, it was not to be inserted into section 1059 (2) of the Code of Civil Procedure – instead, its location based on the systematic structure of the law is in section 1040 (4) sentence 2 of the present draft bill. Another aspect is that reference is to be made, in section 1059 (1) sentence 2 of the present draft bill, to section 1059a of the present draft bill, which isolates the already existing possibility of setting aside an arbitral award where grounds for retrial of the case are given (section 580 of the Code of Civil Procedure) from section 1059 (2) number 2 of the Code of Civil Procedure, codifying it as a new request for retrial of the case. This codification means that it has become necessary to expressly indicate also this exception from the principle of exclusivity in section 1059 (1) of the present draft bill. Since the request for retrial of the case according to section 1059a of the present draft bill is an extraordinary legal remedy, the intention is to uphold the basic statement made in section 1059 (1) sentence 1 of the present draft bill, this being that only the application to have an arbitral award set aside under section1059 (2) and (3) of the Code of Civil Procedure may be filed against an arbitral award.

Re lit. b (section 1059 (3) sentence 3 of the present draft bill)

In two court orders from 2016 and 2017, the Federal Court of Justice has dealt with, among other things, the commencement of the period provided for in section 1059 (3) sentence 2 of the Code of Civil Procedure regarding an application to have an arbitral award set aside (Federal Court of Justice, court order of 9 August 2016 – I ZB 1/15, NJW 2017, 488 with notes *Gebert/Pörnbacher*, SchiedsVZ 2017, 105 et seqq.; *Krapfl/Wilske*, LMK 2016, 382306; Federal Court of Justice, court order of 11 May 2017 – I ZB 75/16, NJW 2017, 3723). The subject matter addressed in the decisions was the question of how to deal with court proceedings governed by sections 1040 (3) sentence 2, 1062 (1) number 2 alternative 2 of the Code of Civil Procedure and with court proceedings governed by sections 1032 (2), 1062 (1) number 2 alternative 1 of the Code of Civil Procedure if an arbitral award is issued, in application of sections 1032 (3), 1040 (3) sentence 3 of the Code of Civil Procedure, prior to the conclusion of these proceedings by a final and binding ruling (including any proceedings before a court of appeal that may ensue [section 1065 (1)

sentence 1 of the Code of Civil Procedure]). The Federal Court of Justice gave up the legal precedent it had established previously for cases involving such a scenario and initially ruled that the legal interest in bringing an action by way of filing a request for a court ruling against an interlocutory decision affirming jurisdiction (sections 1040 (3) sentence 2, 1062 (1) number 2 alternative 2 of the Code of Civil Procedure) continues to exist despite an arbitral award having been issued (Federal Court of Justice, court order of 9 August 2016 – I ZB 1/15, NJW 2017, 488 at margin number 9). Subsequently, the Federal Court of Justice has extended this finding to include requests filed with a court for a declaratory ruling that establishes the admissibility or inadmissibility of arbitral proceedings and has ruled that the legal interest in bringing an action continues to be given in this scenario as well (Federal Court of Justice, court order of 11 May 2017 – I ZB 75/16, NJW 2017, 3723 at margin number 10–14). In both decisions, the Federal Court of Justice was guided by the concept of procedural economy: The intention was for the cost and effort already expended by the parties in these proceedings to not end up as sunk costs, and to enable the closing of the proceedings despite an arbitral award having been issued in the meantime.

Since, however, section 1059 (3) sentence 2 of the Code of Civil Procedure determines the commencement of the period governing an application to have an arbitral award set aside as the day on which the party filing the application has received the arbitral award, the Federal Court of Justice concurrently established that in such cases, the period ought to commence running only on the day on which the party filing the application received the decision issued by the court (Federal Court of Justice, court order of 9 August 2016 – I ZB 1/15, NJW 2017, 488 at margin number 9; Federal Court of Justice, court order of 11 May 2017 – I ZB 75/16, NJW 2017, 3723 at margin number 14). Otherwise, there would have been the risk that – despite the court decision having become final and binding that found the arbitral tribunal to lack jurisdiction – an application to have an arbitral award set aside no longer could have been filed. In this context, the Federal Court of Justice phrased its ruling such that the period was to commence running, “by way of accordingly applying section 1059 (3) sentence 2 of the Code of Civil Procedure, on that day on which the party filing the application has received the decision issued by the court” (Federal Court of Justice, court order of 11 May 2017 – I ZB 75/16, NJW 2017, 3723 at margin number 14). This convincing case law is the reason for introducing the new sentence 3 in section 1059 (3) of the present draft bill. The case law of the Federal Court of Justice is included in section 1059 (3) sentence 3 of the present draft bill on the one hand for reasons of clarification, while on the other hand the exact time at which the period commences running is provided for in order to determine a point in time that is sufficiently clear for legal practice.

To begin with, section 1059 (3) sentence 3 of the present draft bill stipulates that the commencement of the period deviating from that set out in section 1059 (3) sentence 2 of the Code of Civil Procedure is to be applied only if proceedings under section 1040 (3) sentence 2 of the Code of Civil Procedure or section 1032 (2) of the Code of Civil Procedure are pending at the point in time at which the party filing the application has received the arbitral award (on the [corresponding] applicability of sections 261, 262 of the Code of Civil Procedure in these proceedings, cf. *Münchener Kommentar zur ZPO*/*Münch*, 6th edition 2022, commentary on section 1063 of the Code of Civil Procedure at margin number 4). Since this is a matter of course, the fact that these proceedings must be court proceedings relating to the arbitral proceedings on which the arbitral award is based did not need to be put into express terms in the provision. Subsequently, the commencement of the period for these cases is defined, in the first alternative, as the day on which the decision terminating the proceedings has become final and binding (in formal terms). In this context, the entry into formal legal force is governed by general principles. Where a court order issued at the first level of jurisdiction by a higher regional court is concerned, for example, this generally will become final and binding unless a complaint on points of law has been filed within a statutory period of one month upon the court order having been served (sections 1065 (1), 575 (1) sentence 1 of the Code of Civil Procedure). In the second alternative, the circumstance is taken into account – in keeping with section 91 (5) of the Code of Civil

Procedure – that it is also conceivable for proceedings to come to an end without a final and binding decision, for example in the case of legal action being withdrawn in accordance with section 269 of the Code of Civil Procedure. In such cases, the period commences on the day on which the court proceedings have been closed in some other manner.

Re Number 13 (section 1059a of the present draft bill)

Section 1041 (1) number 6 of the Code of Civil Procedure stipulated, in the version applicable until 31 December 1997, that setting aside an arbitral award also may be applied for "if the prerequisites are given according to which, in the cases governed by nos. 1 to 6 of section 580, the action for retrial of the case is an available remedy." The Act on the Revision of Arbitration Law of 22 December 1997 forwent, in consideration of the UNCITRAL Model Law, an express reference in section 1059 of the Code of Civil Procedure to the grounds for retrial of the case set out in section 580 of the Code of Civil Procedure; however, the official explanatory statement did state that they are covered by the "ordre public" clause of section 1059 (2) number 2 of the Code of Civil Procedure (Bundestag printed paper 13/5274, p. 59).

By incorporating the grounds for retrial of the case in section 1059 (2) number 2 of the Code of Civil Procedure, however, these grounds – which enable a reopening of proceedings where state court decisions are concerned – likewise are subject to the period set out in section 1059 (3) of the Code of Civil Procedure. Outside of this time limit, therefore, the only means of enforcing the grounds for retrial of the case is to take recourse to section 826 of the Civil Code (Federal Court of Justice, court order of 2 November 2000 – III ZB 55/99, NJW 2001, 373 [374]; Supreme Court for the Free State of Bavaria (BayObLG, *Bayerisches Oberstes Landesgericht*), court order of 7 December 2022 – 101 Sch 76/22, BeckRS 2022, 37205 at margin number 73 et seqq.); in defending against an application for a declaration of enforceability, section 1060 (2) sentence 1 and 3 of the Code of Civil Procedure can be relied on.

Other than is the case for state court decisions, there is no possibility for arbitral awards to have proceedings reopened (sections 578 et seqq. of the Code of Civil Procedure) that would also allow the arbitral award to be set aside by a court also after the period set out in section 1059 (3) of the Code of Civil Procedure has elapsed, if grounds for retrial of the case are given, by taking recourse to codified legal remedies. In light of the particular weight of the grounds for retrial of the case defined in section 580 of the Code of Civil Procedure and of the fact that arbitral awards have the effect of a final and binding judgment (section 1055 of the Code of Civil Procedure), it appears desirable, however, to create such a legal remedy. For this reason, a legal remedy is introduced by section 1059a of the present draft bill under which it will be possible in future to assert all grounds for retrial of the case as defined in section 580 of the Code of Civil Procedure also after the period defined in section 1059 (3) of the Code of Civil Procedure has elapsed (on the corresponding calls for this to be done, cf. *Münch*, ZZPInt 23 [2018], 259 [289 et seq.] [who, however, has called for a supplementation of the causes for setting aside an arbitral award as set out in section 1059 (2) number 1 of the Code of Civil Procedure]; *Wagner*, *Rechtsstandort Deutschland im Wettbewerb*, 2017, p. 164 et seqq.; *Schlosser*, *Festschrift für Hanns Prütting*, 2018, p. 877 et seqq.). In this way, the legitimate interest in creating, in the event of exceptional circumstances, an exception from the rule of res judicata is taken into account also after the period stipulated in section 1059 (3) of the Code of Civil Procedure has expired. Since, in arbitral proceedings just as in state court proceedings, grounds for retrial of the case are an exceptionally rare occurrence, the number of successful requests for retrial of the case is likely to be low.

By so introducing the concept of a request for retrial of the case, German law is not forging any new paths compared to other jurisdictions: Austrian law already provides for a comparable ground for setting aside the arbitral award in section 611 (2) number 6 of the Austrian Code of Civil Procedure, for which a particular period likewise is defined in section

611 (4) sentence 4 of said Code. Swiss law as well has been amended to provide for a similar legal remedy in Article 190a of the Swiss Federal Act on Private International Law.

Re Section 1059a (1) sentence 1 of the present draft bill

Section 1059a (1) sentence 1 of the present draft bill introduces a legal remedy that is designated, in alignment with section 580 of the Code of Civil Procedure ("action for retrial of the case") as a "request for retrial of the case." The court having jurisdiction, as stipulated in section 1062 (1) number 4 of the present draft bill, may set aside an arbitral award even if the time limit for an application to have an arbitral award set aside defined in section 1059 (3) of the Code of Civil Procedure already has expired, so that it is no longer admissible to file an application to have an arbitral award set aside according to section 1059 of the Code of Civil Procedure. The prerequisite for a successful request for retrial of the case is that a ground for retrial of the case as provided for in section 580 of the Code of Civil Procedure is given, in other words, that the arbitral award is seriously flawed.

The wording used in section 1059a (1) sentence 1 of the present draft bill is in line with the language used in section 1059 (2) number 1 of the Code of Civil Procedure and in section 1041 (1) number 6 of the Code of Civil Procedure in its previous version. The request for retrial of the case is premised on the time limit defined in section 1059 (3) of the Code of Civil Procedure having elapsed. Grounds for retrial of the case already may be asserted during the time limit as part of public policy by relying on section 1059 (2) number 2 (b) of the Code of Civil Procedure.

Other than has been provided for in section 1041 (1) number 6 of the Code of Civil Procedure in its previous version, reference now is made to the grounds for retrial of the case set out in section 580 of the Code of Civil Procedure since there is no reason to treat arbitral awards and judgments from state courts differently with regard to the validity of certain grounds for retrial of the case. Thus, the state court is to set aside an arbitral award, upon a corresponding application having been filed, if a ground for retrial of the case as defined in section 580 of the Code of Civil Procedure is given. By including the phrase "shows sufficient cause," it is indicated that the party requesting retrial must, just as is the case under section 1059 (2) number 1 of the Code of Civil Procedure, at any rate submit conclusive reasons why such a ground for retrial of the case is given (cf. order issued by the Federal Court of Justice on 23 July 2020 – I ZB 88/19, SchiedsVZ 2021, 46 at margin number 12).

Re Section 1059a (1) sentence 2 of the present draft bill

According to section 581 (1) of the Code of Civil Procedure, an action for retrial of the case in the cases defined in section 580 number 1 to 5 of the Code of Civil Procedure is premised on a "final and binding sentence [having] been issued as a result of the criminal offence" or on the fact that "it is not possible to initiate or implement criminal proceedings for other reasons than lack of evidence." According to case law, the refusal to issue a declaration of enforceability for an arbitral award while citing a cause for retrial of the case as part of public policy requires that all prerequisites for asserting this ground for retrial of the case have been met, among which the Federal Court of Justice also counts section 581 (1) of the Code of Civil Procedure (Federal Court of Justice, court order of 6 October 2016 – I ZB 13/15, SchiedsVZ 2018, 53 at margin number 58).

In scholarly literature, a corresponding requirement for a conviction to have been issued by a criminal court is not regarded as appropriate in the area of arbitration law and is regarded as the reason why the scope of application of section 826 of the Civil Code has been relied on to a continually increasing degree as an instrument serving to eliminate final and binding arbitral awards (cf. *Schlosser*, *Festschrift für Hanns Prütting*, 2018, p. 877 [885 et seq.]; *G. Wagner*, *Rechtsstandort Deutschland im Wettbewerb*, 2017, p. 169). The reason is that

it has been recognised for quite some time now also in the field of state civil justice, where section 826 of the Civil Code is concerned, that no prior final and binding conviction by a criminal court is needed even if the action brought on the basis of section 826 of the Civil Code competes with the action for retrial of the case in accordance with sections 580 et seqq. of the Code of Civil Procedure (Federal Court of Justice, judgment of 27 March 1968 – VIII ZR 141/65, NJW 1968, 1275 [1277]; Zöller/*Greger*, 34th edition 2022, commentary on section 581 of the Code of Civil Procedure at margin number 1).

A need for requiring a conviction by a criminal court is not evident. In scenarios involving cross-border disputes, which can be observed more frequently in the area of arbitration than in state civil justice, it is likely, moreover, that it will be possible to obtain prior convictions by criminal courts only in rare instances as a consequence of practical difficulties. For these reasons, stipulating such a requirement for the request for retrial of the case as defined in section 1059a of the present draft bill has been forgone.

Re Section 1059a (2) of the present draft bill

Section 1059a (2) of the present draft bill is closely aligned with section 582 of the Code of Civil Procedure. Section 582 of the Code of Civil Procedure emphasises the auxiliary nature of the action for retrial of the case; such an action is to prevail only if the ground for retrial of the case concerned could not have been asserted in earlier proceedings even by a litigant exercising due care (cf. *Münchener Kommentar zur ZPO*/*Braun/Heiss*, 6th edition 2020, commentary on section 582 of the Code of Civil Procedure at margin number 1 et seq.; Zöller/*Greger*, 34th edition 2022, commentary on section 582 of the Code of Civil Procedure at margin number 1). In particular where the protection of the res judicata effect of an arbitral award is concerned, the validity of the legal concept enshrined in section 582 of the Code of Civil Procedure is of essential importance. The intention is to open up the opportunity, by means of section 1059a of the present draft bill, to contest a final and binding arbitral award even after the time limit applying to applications for setting aside such an award stipulated in section 1059 (3) of the Code of Civil Procedure has elapsed, solely to a litigant exercising due care. In contrast to section 581 of the Code of Civil Procedure, section 582 of the Code of Civil Procedure is applied by the courts also in the context of an action brought on the basis of section 826 of the Civil Code (Federal Court of Justice, judgment of 29 November 1988 – XI ZR 85/88, NJW 1989, 1285 [1286]), which underlines the great significance this provision has for the subsequent suspension of res judicata.

Essentially, the language used in section 1059a (2) of the present draft bill is aligned with section 582 of the Code of Civil Procedure. In interpreting this provision, due account is to be had to the principles developed for it and the case law established in its regard. The term “earlier proceedings” first of all designates, in the context of section 1059a (2) of the present draft bill, the arbitral proceedings itself, but can also refer to the proceedings for setting aside an arbitral award as provided for in section 1059 of the Code of Civil Procedure, which have been separately emphasised in the new provision, in the context of which the grounds for retrial of the case as set out in section 580 of the Code of Civil Procedure can still be asserted as part of public policy.

Re Section 1059a (3) sentence 1 of the present draft bill

The time limit applying to a request for retrial of the case under section 1059a of the present draft bill is set out in section 1059a (3) of the present draft bill. As is the case for an action for retrial of the case brought against a final and binding judgment bringing the proceedings to an end (section 586 (1) of the Code of Civil Procedure), the request for retrial of the case under section 1059a of the present draft bill likewise is to be filed within a statutory period of one month.

Re Section 1059a (3) sentence 2 of the present draft bill

Section 1059a (3) sentence 2 of the present draft bill states that subsections (2) and (4) of section 586 of the Code of Civil Procedure apply accordingly. Thus, the time limit governing the request for retrial of the case begins running on that day on which the party became aware of the ground for retrial of the case, but not prior to the arbitral award having become final and binding (section 586 (2) sentence 1 of the Code of Civil Procedure). Once five years have elapsed, counting from the date on which the arbitral award has become final and binding, the requests provided for in section 1059a of the present draft bill are generally no longer an available remedy, even if the grounds for reopening the proceedings had remained unknown up until that time (section 586 (2) sentence 2 of the Code of Civil Procedure; Zöller/*Greger*, 34th edition 2022, commentary on section 586 at margin number 8). Since section 1059a (3) sentence 2 of the present draft bill also refers to section 586 (4) of the Code of Civil Procedure, this does not apply to requests for retrial of the case that are based on the ground for retrial of the case set out in section 580 number 8 of the Code of Civil Procedure.

There was no need to include a reference to section 586 (3) of the Code of Civil Procedure since that provision addresses solely the action for annulment.

Re Section 1059a (4) of the present draft bill

The grounds for retrial of the case listed in section 580 of the Code of Civil Procedure are regarded to be a part of public policy in accordance with section 1059 (2) number 2 (b) of the Code of Civil Procedure. This means that they are to be taken into account, in the context of an application for a declaration of enforceability, also in those cases in which the time limit stipulated in section 1059 (3) of the Code of Civil Procedure already has elapsed without the respondent having filed an application to have the arbitral award set aside (section 1060 (2) sentence 3 of the Code of Civil Procedure). Nonetheless, there may be situations in which an arbitral award has been declared enforceable although actually, a ground for retrial of the case was given. Thus, it is conceivable, for example, that a party became aware of the ground for retrial of the case only after a declaration of enforceability has been made. Since particularly grave reasons arguing against the continued existence of an arbitral award are asserted in filing a request for retrial of the case, not even the fact that a declaration of enforceability has been made is to prevent a request for retrial of the case. It is for this reason that section 1059a (4) of the present draft bill stipulates that, in the event of a request for retrial of the case having been granted, a court concurrently is to set aside any declaration of enforceability of the arbitral award that may have been made. Other than is the case for the annulment of foreign arbitral awards (section 1061 (3) of the Code of Civil Procedure), this does not require a special application to be filed.

Re Section 1059a (5) of the present draft bill

Section 1059 (4) of the Code of Civil Procedure provides that, where appropriate and so requested by a party, the court may remand a matter to the arbitral tribunal while setting aside the arbitral award. Section 1059a (5) of the present draft bill stipulates that this provision is to apply accordingly in the context of the request for retrial of the case under section 1059a of the present draft bill. Even if an arbitral award is to be set aside by a court because a ground for retrial of the case exists, there may be cases that are suited for the matter to be remanded to the arbitral court. However, for both legal and practical reasons, such scenarios are likely to be a rare occurrence. The reason is that, wherever a ground for retrial of the case is given, the original arbitral proceedings likely will be so seriously flawed that remanding the matter to the arbitral tribunal will not be an available option. Furthermore, it may be that the arbitrators no longer are available if the arbitral proceedings already had taken place a longer while ago.

Where an arbitral award is set aside by a court, this will have the consequence, in cases of doubt, that the arbitration agreement once again enters into force where the subject matter of the dispute is concerned. This principle enshrined in section 1059 (5) of the Code of Civil Procedure likewise is applied accordingly in the context of a request for retrial of the case under section 1059a of the present draft bill. The reason is that it should not make a difference for the continued existence of an arbitration agreement whether the ground for retrial of the case is asserted as part of public policy prior to the period of three months having elapsed, or, after said period has elapsed, by means of a request for retrial of the case as provided for in section 1059a of the present draft bill.

Re Number 14 (section 1060 (2) sentence 4 of the present draft bill)

Section 1060 (2) sentence 1 of the Code of Civil Procedure stipulates that a court is to set aside an arbitral award if it dismisses the application seeking a declaration of enforceability. As regards this situation arising in proceedings, the Federal Court of Justice already has decided that section 1059 (4) of the Code of Civil Procedure is to be applied accordingly (Federal Court of Justice, court order of 7 June 2018 – I ZB 70/17, SchiedsVZ 2018, 318 at margin number 24 et seqq.; Federal Court of Justice, court order of 18 July 2019 – I ZB 90/18, SchiedsVZ 2020, 46 at margin number 45 et seq.). Thus, the court may remand the matter, upon request of a party, to the arbitral tribunal also in proceedings for the declaration of enforceability if a case suitable for proceeding in this manner is given and if the court dismisses the application seeking a declaration of enforceability while setting aside the arbitral award. This pertinent case law is codified by section 1060 (2) sentence 4 of the present draft bill because no reason is apparent for why proceedings for setting aside an arbitral award and proceedings for the declaration of enforceability should be treated differently with regard to the applicability of section 1059 (4) of the Code of Civil Procedure.

In addition, it is likewise stipulated that section 1059 (5) of the Code of Civil Procedure be applied accordingly. By an arbitral award being set aside, based on a dismissal of the application for it to be declared enforceable, the arbitration agreement thus once again enters into force, in cases of doubt, where the subject matter of the dispute is concerned. This stipulation also serves to provide clarity since the prevailing opinion in scholarly literature already has held since long that section 1059 (5) of the Code of Civil Procedure applies accordingly in proceedings for the declaration of enforceability (*Hausmann*, in: *Festschrift für Hans Stoll*, 2001, p. 593 [615]; *Münchener Kommentar zur ZPO*/*Münch*, 6th edition 2022, commentary on section 1060 of the Code of Civil Procedure at margin number 34; Musielak/Voit/*Voit*, 20th edition 2023, commentary on section 1060 of the Code of Civil Procedure at margin number 15).

Re Number 15 (section 1062 of the present draft bill)

Re lit. a (section 1062 (1) number 4 of the present draft bill)

Within the period stipulated by section 1059 (3) of the Code of Civil Procedure, the higher regional courts already take a decision under current law when they rule on an application to have an arbitral award set aside in accordance with section 1059 of the Code of Civil Procedure, on whether grounds for retrial of the case are given (section 580 of the Code of Civil Procedure) as part of public policy (section 1059 (2) number 2 (b) of the Code of Civil Procedure). In light of the introduction of the request for retrial of the case under section 1059a of the present draft bill, the higher regional courts are intended to have jurisdiction in future to decide also on this request. The reason is that it should not make any difference for the enforcement of grounds for retrial of the case, where the jurisdiction of a court is concerned, whether they were asserted before or after the time limit has elapsed that is stipulated in section 1059 (3) of the Code of Civil Procedure. In any case, the higher regional court should have jurisdiction (cf. *G. Wagner*, *Rechtsstandort Deutschland im Wettbewerb*, 2017, p. 169). This is achieved by the amendment made by section 1062 (1) number 4 of the present draft bill, in which the jurisdiction of the higher regional court as the court of first

instance is extended to include requests for retrial of the case in accordance with section 1059a of the present draft bill.

Re lit. b (section 1062 (5) of the present draft bill)

Re lit. aa (section 1062 (5) sentence 2 of the present draft bill)

The Act for the Promotion of Germany as a Forum creates the opportunity, in section 119b of the draft bill of the Courts Constitution Act, for *Land* governments to institute, by statutory instrument, special divisions with a single higher regional court or a supreme court established by the *Land* for its territory, these being the commercial courts. The commercial courts have significant expertise in trade and commerce and in particular are equipped with the skillset required to settle complex disputes in the fields of trade and commerce. The intention is that a *Land* will have the opportunity to institute a commercial court only with one higher regional court or the supreme court it has established for its territory, respectively.

By section 1062 (5) sentence 2 of the present draft bill – a generally more specific provision than section 13a (1) of the Courts Constitution Act – the options for so concentrating proceedings that have already been provided for in this subsection are expanded for the *Länder* and each *Land* is given the possibility of assigning those arbitration-related matters set out in section 1062 (1) of the present draft bill to the commercial court instituted with a higher regional court or with the supreme court established by the *Land* for its territory. In this way, the particular expertise of the commercial courts in settling complex disputes can be unlocked for the procedures in arbitration-related matters provided for in section 1062 (1) of the Code of Civil Procedure if the *Land* so intends and correspondingly directs that this be done in a statutory instrument enacted by its government. Where a *Land* makes use of this option, an applicant will have to review, prior to filing an application, which higher regional court has local jurisdiction, and will subsequently need to determine whether the jurisdiction of that court has been assigned, by a statutory instrument enacted by the *Land* government, to a commercial court.

As an authorisation to issue statutory instruments, section 1062 (5) sentence 2 of the present draft bill not only enables all of the proceedings provided for in section 1062 (1) of the present draft bill to be assigned to a commercial court. The body issuing the statutory instrument furthermore is granted the possibility of assigning only certain types of proceedings provided for in section 1062 (1) number 4 of the present draft bill to the commercial court instituted in this *Land* and to otherwise uphold the jurisdiction of the (ordinary) higher regional courts.

Generally, commercial courts are only competent for certain civil disputes between businesses as well as disputes arising from or in connection with the acquisition of a business, or of shares in a business, where the value of dispute is upwards of one million euros (section 119b (1) sentence 1 of the draft bill of the Courts Constitution Act), provided that an agreement by the parties as provided for in section 119b (2) sentence 1 of the draft bill of the Courts Constitution Act exists. Neither of these restrictions will apply where proceedings under section 1062 (1) of the present draft bill are concerned and jurisdiction has been assigned, in accordance with section 1062 (5) sentence 2 of the present draft bill, by a statutory instrument enacted by the *Land* government to a commercial court instituted in said *Land*. This results from the fact that the mandatory jurisdiction of the higher regional courts at the first level of jurisdiction already has been stipulated in section 1062 (1) of the present draft bill, and that this mandatory jurisdiction is assigned to the commercial court by a statutory instrument enacted by the *Land* government on the basis of section 1062 (5) sentence 2 of the present draft bill. Thus, the existing mandatory jurisdiction of the higher regional courts is assigned, which retains its legal nature by way of this assignment and is not affected by the specific prerequisites stipulated in section 119b (1) of the draft bill of the Courts Constitution Act.

Compared to other jurisdictions, German law is not forging any new paths with this assignment to the commercial courts of the proceedings listed in section 1062 (1) of the present draft bill – which assignment the *Länder* are free to make or to refrain from – without this requiring a separate agreement by the parties. French civil procedural law likewise stipulates a corresponding mandatory assignment to a formation of the court that is similar to the German commercial courts. The chamber for international commercial matters (*chambre commerciale internationale*) instituted with the Paris court of appeals (*cour d'appel de Paris*) is competent to rule on international arbitration matters without the jurisdiction of this chamber for arbitration matters requiring a separate agreement by the parties (cf. Article 1.1 sub-paragraph 3 of the *Protocole relatif à la procédure applicable devant la Chambre internationale de la cour d'appel de Paris* of 7 February 2018).

Re lit. bb (section 1062 (5) sentence 4 of the present draft bill)

Section 119b (6) of the draft bill of the Courts Constitution Act enables the *Länder* to institute a joint commercial court with a higher regional court or a supreme court established by the *Land* for its territory or, respectively, to agree on its establishment. This legal provision seeks to institute special centres of competence for the resolution of major disputes in the fields of trade and commerce that have jurisdiction beyond the boundaries of the *Länder*. The provision of section 1062 (5) sentence 4 of the present draft bill, which precedes section 13a (2) of the Courts Constitution Act, ties in with this possibility – which the *Länder* are free to opt for or to refrain from – and expands the opportunities for concentration already provided for in section 1062 (5) sentence 3 of the present draft bill:

Where several *Länder* have instituted a joint commercial court with a higher regional court or a supreme court established by the *Land* for its territory, this allows them to agree on the jurisdiction of the joint commercial court also for the proceedings listed in section 1062 (1) of the present draft bill. In this way, a formation of the court with jurisdiction beyond the boundaries of the *Länder* concerned would be competent to rule on the types of proceedings listed in section 1062 (1) of the present draft bill and would quickly acquire special experience in the settlement of arbitration matters. This latter aspect is in the interests of promoting Germany as a venue for dispute resolution: Not only would a further concentration in the field of arbitration law increase the specialisation of this formation of the court in said field, it would also make a contribution towards further streamlining the case law being established in this area of law.

Re Number 16 (section 1063 (3) sentence 1 of the present draft bill)

In its current version, section 1063 (3) sentence 1 of the Code of Civil Procedure stipulates that the presiding judge of a division for civil matters may issue an order, without having previously heard the opposing party, to the effect that – up until a decision has been issued regarding the application – the party filing the application may pursue compulsory enforcement based on the arbitral award (alternative 1) or may enforce the interim measures issued by the arbitral tribunal according to section 1041 of the Code of Civil Procedure (alternative 2).

The proposed amendment of section 1063 (3) sentence 1 of the present draft bill clarifies that this authority of the presiding judge to issue an order is given only in urgent cases. In this way, it is ensured that the provision runs in parallel with section 944 of the Code of Civil Procedure, which likewise provides, for the fields of seizure and injunction, that the presiding judge has the authority to decide, while expressly limiting this authority to "urgent cases." In this context, it is left to the courts to define, on a case-by-case basis, when such a correspondingly urgent case is given that enables the (provisional) compulsory enforcement of the arbitral award (alternative 1) or a (provisional) permission of enforcement of a measure ordered by the arbitral tribunal according to section 1041 (1) of the Code of Civil Procedure.

Inserting the words “[o]n application” also clarifies that the presiding judge may not issue an order under section 1063 (3) sentence 1 of the present draft bill ex officio, and that instead, this order is premised on an application having been filed – a view already taken in scholarly literature under current law (*Ebert*, SchiedsVZ 2020, 55 [56]; *Münchener Kommentar zur ZPO*/*Münch*, 6th edition 2022, commentary on section 1063 of the Code of Civil Procedure at margin number 35).

Re Number 17 (sections 1063a, 1063b of the present draft bill)

Re Section 1063a of the present draft bill

On the basis of section 1062 (5) sentences 2 and 4 of the present draft bill, the *Länder* have the opportunity to generally assign the proceedings designated in section 1062 (1) of the present draft bill to a commercial court or a joint commercial court, respectively. As concerns the proceedings designated in section 1062 (1) of the present draft bill that are being conducted before a commercial court, supplementing provisions are made in section 1063a of the present draft bill that are to be applied solely if the corresponding proceedings have been assigned to a commercial court on the part of the *Länder*. The provisions serve to take account of the special aspects of commercial courts and to unlock the significant benefits they hold out for arbitration.

Re Section 1063a (1) of the present draft bill

English is regarded as the “lingua franca” in the world of international arbitration. For this reason, a number of jurisdictions already have permitted the English language to be used in court proceedings that are connected to arbitral proceedings. For example, Article 77 (2bis) of the Swiss Federal Act on the Federal Supreme Court of Switzerland (*Bundesgesetz über das Bundesgericht*) provides that submissions to the court (“*Rechtsschriften*”) may be “made in the English language” in such proceedings. As a consequence, it is possible to submit to the Federal Supreme Court of Switzerland also English-language briefs in the corresponding proceedings. Likewise, English-language submissions may be made to the chamber for international commercial matters (*chambre commerciale internationale*) instituted with the Paris court of appeals (*cour d’appel de Paris*), and it is possible to plead in English. Moreover, the decisions of the chamber are to be furnished with a translation into English (cf. Article 2.2, 2.3 and 7 of the *Protocole relatif à la procédure applicable devant la Chambre internationale de la cour d'appel de Paris* of 7 February 2018).

By way of further boosting Germany’s attractiveness as a venue for arbitration, the German arbitration law will also follow this path in the future, which will enable, subject to certain prerequisites, the proceedings designated in section 1062 (1) of the present draft bill to be conducted, in their entirety, in English (on the various concepts of opening up the proceedings designated in section 1062 (1) of the present draft bill for the English language, cf. *Illmer*, ZRP 2011, 170; *G. Wagner*, *Rechtsstandort Deutschland im Wettbewerb*, 2017, p. 173–176; *Wolff*, SchiedsVZ 2016, 293 [305]).

Re Section 1063a (1) sentence 1 of the present draft bill

Allowing English to be used in appropriate contexts is achieved by section 1063a (1) sentence 1 of the present draft bill. This provision opens up the opportunity to the parties to pursue the proceedings designated in section 1062 (1) of the present draft bill before a commercial court in their entirety in English. It is closely aligned with section 184a (1) and (3) of the draft bill of the Courts Constitution Act, which provides, where proceedings are concerned “that relate to selected fields of disputes listed in section 119b (1) sentence 1,” for a corresponding basis of authorisation for the *Länder* for the introduction of English as a language of the court (section 184a (1) of the draft bill of the Courts Constitution Act) while concurrently stipulating the special prerequisites and requirements governing the pursuit of

proceedings in this language. In order to preserve the uniform structure of Book 10 of the Code of Civil Procedure as German “Arbitration Act” and, at the same time, to take account of the many varied special aspects governing the general initial jurisdiction of the higher regional courts for the proceedings designated in section 1062 (1) of the Code of Civil Procedure, section 1063a (1) of the present draft bill has made a separate and independent provision that determines English as the language of the court.

In order for proceedings designated in section 1062 (1) of the present draft bill to be allowed to be conducted entirely in English, several prerequisites cumulatively must be met: First, the proceedings designated in section 1062 (1) of the present draft bill must be conducted before a commercial court because only these formations at the higher regional courts meet, as institutions, the prerequisites applying to oral hearings held entirely in English, and thus ensure that the proceedings are conducted properly in this language. Second, English must have been determined as the court language for this commercial court by a statutory instrument enacted by the *Land* government (section 1063a (1) sentence 1 number 1 of the present draft bill read in conjunction with section 184a (1) sentence 1 number 2 of the draft bill of the Courts Constitution Act). This is justified by the fact that section 184a (1) sentence 1 number 2 of the draft bill of the Courts Constitution Act permits the *Länder* to choose whether a commercial court established in their respective territories is to hold hearings only in German or also in English. Only if a *Land* has provided for English to be a language of its commercial courts, it will be appropriate for those types of proceedings designated in section 1062 (1) of the present draft bill to be conducted in English. There is no limitation, as concerns the proceedings designated in section 1062 (1) of the present draft bill, to the proceedings addressed solely in section 184a (1) sentence 1 of the draft bill of the Courts Constitution Act, these being “proceedings that relate to selected fields of disputes listed in section 119b (1) sentence 1.”

Finally, in order for proceedings to be conducted in English, it is required for the parties to have agreed on this either expressly or tacitly (section 1063a (1) sentence 1 number 2 of the present draft bill). This prerequisite mirrors the stipulation of section 184a (3) sentence 1 of the draft bill of the Courts Constitution Act and is underpinned by the concept that only an express or tacit agreement of the parties can justify a deviation from the principle that the language of the court is German (section 184 sentence 1 of the Courts Constitution Act).

However, it is possible to replace this express agreement by the fact of the respondent having made a plea without raising an objection. Other than was the case for section 184a (3) sentence 1 of the draft bill of the Courts Constitution Act, the prerequisites for a plea made without raising an objection were to be put into slightly different terms. The reason is that based on section 1063 (4) of the Code of Civil Procedure read in conjunction with section 78 (3) of the Code of Civil Procedure, the proceedings designated in section 1062 (1) of the Code of Civil Procedure before the higher regional courts are proceedings pursued by the parties themselves (“*Parteiprozess*”), in which there is no requirement to be represented by counsel for as long as no order has been issued to hold an oral hearing (Federal Court of Justice, court order of 18 June 2020 – I ZB 83/19, NJW-RR 2020, 1191 at margin number 16; *Münchener Kommentar zur ZPO*/*Münch*, 6th edition 2022, commentary at section 1063 of the Code of Civil Procedure at margin number 37 et seq.). In order to protect respondents who are not aware of the legal consequences entailed by making a plea without raising an objection as regards the use of the English language, section 1063a (1) sentence 1 number 2 of the present draft bill provides for this possibility only in cases in which the respondent is represented by counsel. If, by making the statement of defence in English, the respondent represented by counsel makes a plea in arguing the defence without raising an objection to this language being used, then the proceedings are to be conducted in this language based on the plea having been made without an objection being raised. In all other cases, the provision of section 184 sentence 1 of the Courts Constitution Act continues to apply, meaning that the statement of claim is to be subsequently submitted in a German version.

Re Section 1063a (1) sentence 2 of the present draft bill

According to section 1063a (1) sentence 2 of the present draft bill, the court of its own motion is to have the court orders defined in section 1063 (1) sentence 1 of the Code of Civil Procedure translated completely into German, whereby the translation is to be inseparably attached to the court order. This inseparable attachment enables any enforcement procedure that may potentially ensue to be pursued without delay.

In the interest of the further development of the law, section 1063a (3) sentence 1 of the present draft bill stipulates that all orders issued by a commercial court in accordance with section 1063 (1) sentence 1 of the Code of Civil Procedure are to be published. Where the court orders have been issued in English, they are to be published together with their translation into German (section 1063a (3) sentence 2 of the present draft bill).

Re Section 1063a (1) sentence 3 of the present draft bill

Section 1063a (1) sentence 3 of the present draft bill clarifies which provisions of Book 6 Division 2 Title 1 (English-language proceedings), which is planned to be included in an amendment of the Code of Civil Procedure, and which provisions of section 184a of the draft bill of the Courts Constitution Act are to be applied accordingly in the context of proceedings that are being conducted, in their entirety, in English based on section 1063a (1) sentence 1 of the present draft bill.

The first one is section 615 of the planned amendment: According to this provision, the statement of claim is to be written in English if it is intended to pursue the proceedings in English. Furthermore, the statement of claim must specify that, on the basis of section 1063a (1) sentence 1 of the present draft bill, the proceedings are to be conducted in their entirety in English (section 615 sentence 1 of the planned amendment read in conjunction with section 1063a (1) sentence 1 of the present draft bill). In addition, the statement of claim is to present an express agreement stating that English is agreed as the language of the proceedings (section 615 sentence 2 of the planned amendment read in conjunction with section 1063a (1) sentence 1 number 2 of the present draft bill).

If, in exceptional circumstances, third parties are involved in legal proceedings designated in section 1062 (1) of the present draft bill – which as a general rule is not to be expected –, then the corresponding application of section 616 of the planned amendment ensures the protection of said third party.

As regards section 617 of the planned amendment, reference is made to section 617 (2) and (3) sentence 2 of the planned amendment. Compared to section 617 (1) and (3) sentence 1 of the planned amendment, section 1063a (1) sentence 2 and (3) of the present draft bill sets out more specific provisions. By including a reference to section 617 (2) of the planned amendment, it is ensured that this provision is accordingly applied in the event of a settlement as provided for in section 794 (1) number 1 of the Code of Civil Procedure, which most likely will be only a rare and exceptional occurrence in the proceedings listed in section 1062 (1) of the Code of Civil Procedure. By including a reference to section 617 (3) sentence 2 of the planned amendment, it is clarified that in those cases in which proceedings are pursued in closed hearings on the basis of a decision under section 273a of the planned amendment, the orders and any translations that may be prepared thereof must be published in excerpts such that no conclusions can be drawn regarding any details of the proceedings that merit protection.

No application by analogy of section 618 of the planned amendment was to be provided for since the particular features characterising proceedings on complaints on points of law conducted before the Federal Court of Justice in English meant that a separate provision had to be made in this regard in section 1065 (3) and (4) of the present draft bill.

By contrast, section 184a (3) sentence 1 numbers 1 to 3 of the draft bill of the Courts Constitution Act is to be applied accordingly. Section 184a (3) sentence 1 number 1 of the draft bill of the Courts Constitution Act stipulates that at each stage of the proceedings, an interpreter or translator may be instructed insofar as this is required in the individual case. This may be the case, for example, where special or complex matters of a certain discipline are involved, regarding which the court must rely on an interpretation or translation in order to fully capture the circumstances and facts known at the time as well as the status of the dispute. There also may be a need for a translation in individual cases, for example if the parties submit comprehensive documents that include specialist terminology and for this reason are not fully comprehensible to the court. In this regard, section 185 (1) sentence 1 of the Courts Constitution Act is replaced as the applicable provision.

The reference to section 184a (3) sentence 1 number 2 of the draft bill of the Courts Constitution Act has the effect that section 142 (3) of the Code of Civil Procedure is not applicable to English-language records. Thus, where English-language records are concerned, the court is prevented from issuing an order stipulating that a translation of such a record is to be provided that has been prepared by a translator who has been authorised or publicly appointed for language services of the relevant type in a *Land* in accordance with the provisions of *Land* law or who is considered to be equivalent to such a translator in each case, unless the special prerequisites of section 184a (3) sentence 1 number 1 of the draft bill of the Courts Constitution Act have been met. This provision needed to be included because it would generally not be appropriate to provide for the possibility to direct, in proceedings conducted in English, that English-language records be translated into German. Should the parties submit records made in some other language than German or English, however, the provisions of section 142 (3) of the Code of Civil Procedure continue to apply, so that the court can direct the submission of translations of such records. As regards its scope of application, section 1063a (1) sentence 2 of the present draft bill read in conjunction with section 184 (3) sentence 1 number 2 of the draft bill of the Courts Constitution Act takes precedence before section 1063b (2) of the present draft bill.

By stipulating the corresponding application of section 184a (3) sentence 1 number 3 of the draft bill of the Courts Constitution Act, as a last point, it is provided that the court can direct that a party submitting a record provide a translation into English of German-language records only if the opposing party has applied that this be done. The reason is that the court has command of the German language and that, for reasons of procedural economy, no unnecessary translations are to be prepared.

Re Section 1063a (2) of the present draft bill

Section 1063a (2) of the present draft bill ties in closely with section 184a (3) sentence 2 of the draft bill of the Courts Constitution Act. The purpose of the provision is to ensure that – in proceedings designated in section 1062 (1) of the Code of Civil Procedure that are being conducted before a commercial court for which, in accordance with section 184a (1) sentence 1 number 2 of the draft bill of the Courts Constitution Act, English has been determined as the language of the court by a statutory instrument enacted by the *Land* government – the parties are free to make pleas before this commercial court also in the respective other language if they have expressly or tacitly agreed on this, or if neither of the parties objects thereto without undue delay. The term “make pleas” means, in this context, the submissions the parties make orally without following a script in the course of the oral hearing (section 137 (2) of the Code of Civil Procedure), which is, however, optional in many of the proceedings designated in section 1062 (1) of the present draft bill. By granting this opportunity to the parties, they have a high degree of flexibility and it is ensured that making a plea in the language of the proceedings is mandatory only if a party so wishes.

Re Section 1063a (3) of the present draft bill

According to section 1063a (3) sentence 1 of the present draft bill, all orders issued by a commercial court under section 1063 (1) sentence 1 of the Code of Civil Procedure are to be published. Accordingly, the language in which the court order has been made is irrelevant.

The statutory duty to publish the orders issued by a commercial court stipulated in section 1063 (1) sentence 1 of the Code of Civil Procedure is in line with the existing case law with regard to the publication of court decisions (on this, see the order issued by the Federal Constitutional Court on 14 September 2015 – 1 BvR 857/15, NJW 2015, 3708 at margin number 20; Federal Court of Justice, court order of 5 April 2017 – IV AR(VZ) 2/16, NJW 2017, 1819 at margin number 16). Against this backdrop, and in order to achieve the wide-ranging impact in arbitration matters that is necessary for boosting the attractiveness of Germany as a centre for arbitration, it is stipulated for the orders issued by commercial courts under section 1063 (1) sentence 1 of the Code of Civil Procedure that all decisions issued by these formations of the court are to be published.

The particular modalities of the publication already existing under the current law remain unaffected, such as the requirement that decisions are generally to be anonymised with regard to personal data and circumstances (Federal Constitutional Court, court order of 14 September 2015 – 1 BvR 857/15, NJW 2015, 3708 at margin number 21).

Section 1063a (3) sentence 2 of the present draft bill stipulates that English-language court orders under section 1063 (1) sentence 1 of the Code of Civil Procedure are to be published together with their translation into German (section 1063a (1) sentence 2 of the present draft bill). By including the reference to section 617 (3) sentence 2 of the planned amendment in section 1063a (1) sentence 3 of the present draft bill, it is made clear that, in those cases in which proceedings are held as closed hearings on the basis of a decision under section 273a of the planned amendment, the orders and any translations that may be prepared thereof must be published in excerpts such that no conclusions can be drawn regarding any details of the proceedings that merit protection. Accordingly, no separate provision needed to be made in this regard in section 1063a (3) of the present draft bill.

Re Section 1063a (4) of the present draft bill

Section 1063a (4) of the present draft bill defines which general provisions governing proceedings before the commercial courts as set out in Book 6 Division 2 Title 2 (proceedings before the commercial courts) of the planned amendment are to be applied also in the special situation of proceedings designated in section 1062 (1) of the present draft bill.

To begin with, the provisions made as regards the organisational hearing provided for in section 621 of the planned amendment are to be applied. Accordingly, the commercial court is to make arrangements with the parties at such a hearing, to be held at the earliest possible date, regarding the organisation and course of the proceedings, unless this is prevented by factual or organisational reasons. In this respect, section 621 of the planned amendment is inspired by the case management conference known and well established in arbitral proceedings. The commercial court may forgo holding an organisational hearing if this is prevented by factual or organisational reasons. Since the proceedings designated in section 1062 (1) of the present draft bill often have as their subject matter minor issues in dispute, such as requests for the termination of an arbitrator’s mandate (sections 1038 (1), 1062 (1) number 1 of the Code of Civil Procedure), this exception will be taken recourse to in said proceedings more often than is the case for regular proceedings before the commercial courts as a first level of jurisdiction.

According to section 622 of the planned amendment, which is also to be applied accordingly as stipulated by section 1063a (4) of the present draft bill, the parties have the option to obtain a transcript, provided they file congruent applications with the commercial court, unless this is prevented by factual reasons. The transcript is to be prepared as a verbatim record that can be read by the parties during the hearing or during the taking of evidence, unless the parties agree to waive such possibility of reading the transcript while it is being prepared (section 622 (1) of the planned amendment). There will be a need for a transcript in the proceedings designated in section 1062 (1) of the present draft bill only in special cases. However, since an application by congruent declarations – and thus consensus among the parties – is required, no grounds are apparent for denying the parties this option.

Re Section 1063b of the present draft bill

Re Section 1063b (1) of the present draft bill

While section 1063a of the present draft bill solely establishes special provisions for the proceedings designated in section 1062 (1) of the present draft bill that are conducted before a commercial court, the application of section 1063b of the present draft bill does not depend on the court or formation of the court, respectively, before which the matter is heard. Rather, the provision is to be applied in all proceedings designated in section 1062 (1) and (4) of the present draft bill that are being conducted in German. As a consequence, this provision applies before the local courts just as it does before the higher regional courts. Nonetheless, the provision was to be included after section 1063a of the present draft bill since it is less extensive, in terms of its legal consequences, as regards the possibilities of using the English language.

Section 1063b (1) of the present draft bill is to be understood, just as section 1063a (1) of the present draft bill is, before the backdrop of English being considered as “lingua franca” in (international) arbitral proceedings. Given this situation, and in order to structure court proceedings in arbitration-related matters more efficiently and to enhance Germany’s attractiveness as a venue for arbitration, section 1063b (1) of the present draft bill enables the parties to submit every English-language document from arbitral proceedings in proceedings designated in section 1062 (1) and (4) of the present draft bill also in that language. Thus, there is generally no need for the parties to provide a translation of the document concerned, which not only saves costs for the parties – it also saves them time.

In this context, the term “document” was chosen in order to include any kinds of records, electronic documents and other writings and in order to thus ensure the wide-ranging possible applicability; other than is the case in section 142 (3) of the Code of Civil Procedure, the provision thus is not limited to records in the legal and technical sense of the term. The document must feature an internal link to the arbitral proceedings, meaning that it must have been prepared or submitted in said arbitral proceedings. Thus, an English-language arbitral award or an English-language brief can be submitted, regardless of its embodiment, also in English. This applies in like manner to English-language documents that are or were the subject of dispute in the arbitral proceedings concerned.

The law governing evidence taken in civil proceedings remains unaffected by section 1063b (1) of the present draft bill in all other regards.

Re Section 1063b (2) of the present draft bill

Section 142 (3) sentence 1 of the Code of Civil Procedure stipulates that a court may direct that translations be provided of records made in a foreign language (on the question of whether a court may forgo the corresponding direction and, if so, under which circumstances, cf. the order issued by the Federal Court of Justice on 2 March 1988 – IVb ZB 10/88, NJW 1989, 1432 [1433]; Federal Court of Justice, court order of 16 January

2007 – VIII ZR 82/06, NJW-RR 2007, 1006 at margin number 19; *Armbrüster*, NJW 2011, 812 [813 et seq.]; *Münchener Kommentar zur ZPO*/*Fritsche*, 6th edition 2022, commentary on sections 142–144 of the Code of Civil Procedure at margin number 19; Zöller/*Greger*, 34th edition 2022, commentary on section 142 of the Code of Civil Procedure at margin number 17; *Münchener Kommentar zur ZPO*/*Papst*, 6th edition 2022, commentary on section 184 of the Courts Constitution Act at margin number 9). However, this provision applies, within the scope of application of section 1063b of the present draft bill, only to a limited degree. If a case governed by section 1063b (1) of the present draft bill is given, the court may issue directions as provided for in section 142 (3) of the Code of Civil Procedure only if there is a special need for having a translation supplied in the individual case, as stipulated in section 1063b (2) of the present draft bill. The reason is that, otherwise, the purpose pursued by section 1063b (1) of the present draft bill would be undermined. If there is no such special need, then the court may not procure, also not of its own motion, a translation in analogous application of section 144 (1) sentence 1 alternative 2 of the Code of Civil Procedure (on this possibility, cf. the order issued by the Federal Court of Justice on 16 January 2007 – VIII ZR 82/06, NJW-RR 2007, 1006 at margin number 19).

For example, a special need for having a translation supplied exists if the court seised with the matter has no sufficient command of the English language. However, other circumstances of the individual case can also suffice if the court finds, in its discretion, that they have crossed the threshold of a special need being given, for example if the court in principle has command of the English language to an extent appropriate to the matter before it, but if a particular, specialist topic is in dispute that requires knowledge of English specialist language in this discipline.

It was deliberately stipulated in section 1063b (2) of the present draft bill that solely the court may direct that a translation be prepared and that none of the parties may file an application in this regard. The reason is that, if the parties already have agreed on English as the language of the arbitral proceedings, it seems justified for them to be bound to this decision also in the court proceedings subsequent to the arbitral proceedings where the documents are concerned, without having the ability to demand a translation. Moreover, they will be familiar with the documents already from the arbitral proceedings.

Re Number 18 (section 1064 (1) sentence 3 of the present draft bill)

Section 1054 (2) of the present draft bill allows, unless a party objects, an arbitral award considered to meet the form requirements to also be part of an electronic document that sets out, at the end of the document, the names of all arbitrators and that has been signed by each member of the arbitral tribunal using their qualified electronic signature. This provision serves as the basis for section 1064 (1) sentence 3 of the present draft bill, which explains how an arbitral award issued in this form can be submitted in the context of an application for a court to declare it enforceable. This does not change anything about the fact that section 1064 (1) of the Code of Civil Procedure is nothing more than a rule of evidence and that an arbitral award can be submitted as a simple copy where its existence and authenticity are not in dispute among the parties (cf., as an example, the order issued by the Higher Regional Court of Frankfurt am Main on 17 May 2021 – 26 Sch 1/21, BeckRS 2021, 11890 at margin number 37).

According to section 1064 (1) sentence 3 of the present draft bill, it suffices for the arbitral award issued in the form provided for in section 1054 (2) of the present draft bill to be transmitted to the court as an electronic document compliant with this form requirement. In this context, the transmission typically will be effected by means of electronic communications since, based on section 1054 (5) of the present draft bill, the arbitral award is available to each party as an electronic document.

Re Number 19 (section 1065 (3) and (4) of the present draft bill)

According to section 1065 (1) of the Code of Civil Procedure read in conjunction with section 574 (1) sentence 1 number 1 and (2) of the Code of Civil Procedure, an appeal on points of law is an available remedy against court decisions that have been issued in proceedings designated in section 1062 (1) numbers 2 and 4 of the Code of Civil Procedure. In all other cases, court decisions that have been issued in proceedings designated in section 1062 (1) of the Code of Civil Procedure are incontestable (section 1065 (1) sentence 2 of the Code of Civil Procedure).

Section 1065 (3) of the present draft bill does not affect the permissibility or admissibility of a complaint on points of law being filed with the Federal Court of Justice (section 133 of the Courts Constitution Act) in arbitration matters. Taking the possibility provided for in section 1063a (1) sentence 1 of the present draft bill as its basis, this being to pursue proceedings designated therein before a commercial court entirely in English, section 1065 (3) of the present draft bill in fact creates the opportunity for the subsequent proceedings on complaints on points of law to be conducted before the Federal Court of Justice in English as well. In this context, the provision ties in closely with section 184b of the draft bill of the Courts Constitution Act, which provides for this option, inter alia, for appellate proceedings on points of law against judgments issued by commercial courts at the first level of jurisdiction that were conducted entirely in English.

The reasons speaking for the introduction of English as the language of proceedings on complaints on points of law in arbitration matters correspond to those speaking for its introduction as the language of the commercial courts. Moreover, the intention is to enable the same language of the proceedings to be used, at the appellate instance, that was used at the first level of jurisdiction.

Re Section 1065 (3) sentence 1 of the present draft bill

Other than is the case in section 1063a (1) sentence 1 of the present draft bill, section 1065 (3) sentence 1 of the present draft bill grants discretion to the Federal Court of Justice, based on the model of section 184b sentence 1 of the draft bill of the Courts Constitution Act, in deciding on whether to comply with an application to pursue proceedings on complaints on points of law in English. Thus, the Federal Court of Justice may decide, at its own discretion, whether to comply with a corresponding application or whether it prefers to pursue the proceedings in German (section 184 sentence 1 of the Courts Constitution Act).

The first prerequisite for pursuing proceedings in English is that proceedings previously were conducted in English before the commercial court subject to the stipulations of section 1063a (1) sentence 1 of the present draft bill (section 1065 (3) sentence 1 number 1 of the present draft bill). A further requirement is that the party appealing the decision on points of law applies for the proceedings to be conducted in English in their English-language notice of complaint on points of law (section 1065 (3) sentence 1 number 2 and sentence 2 of the present draft bill). Other than is the case in proceedings before the commercial court, however, this does not require an express agreement by the parties as to the pursuit of the proceedings in English. The reason is that the deviation from German court language by virtue of the parties' intentions already has manifested itself before the commercial court.

Re Section 1065 (3) sentence 2 of the present draft bill

Section 1065 (3) sentence 2 of the present draft bill stipulates that section 618 of the planned amendment is to be applied accordingly. Thus, the notice of complaint on points of law is to be submitted in English, by way of applying section 618 (1) and (2) sentence 1 of

the planned amendment accordingly, if an application as provided for in section 1065 (3) sentence 1 number 2 of the present draft bill has been filed.

If the Federal Court of Justice rejects an application filed under section 1065 (3) sentence 1 number 2 of the present draft bill, the party appealing a decision on points of law is to subsequently submit, by way of applying section 618 (2) sentence 2 of the planned amendment accordingly, a German-language notice of complaint on points of law upon this being demanded by the court.

Re Section 1065 (3) sentence 3 of the present draft bill

Section 1065 (3) sentence 3 of the present draft bill clarifies which particular procedural rules are to be applied accordingly if the Federal Court of Justice complies with an application for the proceedings on complaints on points of law to be conducted in English.

To begin with, section 1063a (2) of the present draft bill is to be applied accordingly. This means that, even if English is the language of the court, the parties continue to be free to make submissions orally before the Federal Court of Justice in German if they have agreed this either expressly or tacitly, unless one of the parties objects thereto without undue delay.

Furthermore, section 184a (3) of the draft bill of the Courts Constitution Act is to be applied accordingly, subject to the proviso that section 142 (3) of the Code of Civil Procedure continues to be applicable, in order to give the Federal Court of Justice some flexibility in handling English-language records.

Re Section 1065 (3) sentence 4 of the present draft bill

By having section 184b (2) of the draft bill of the Courts Constitution Act declared as being accordingly applicable in section 1065 (3) sentence 4 of the present draft bill, it is ensured that the Federal Court of Justice can direct, at any point in time in the proceedings on complaints on points of law, that they be continued in German and that parts of the case files be translated into German. The intention is for the Federal Court of Justice to have not only the (non-recurrent) option immediately at the commencement of the proceedings on complaints on points of law to select the language of the proceedings, but also at a later point in time, should it change its earlier decision for English in the course of the proceedings on complaints on points of law and regard a change to German to be required for properly directing the proceedings and taking a decision on the merits of the matter.

Re Section 1065 (4) of the present draft bill

As provided for in section 577 (6) sentence 1 of the Code of Civil Procedure, the Federal Court of Justice decides by court order on the complaint on points of law relating to arbitration matters. Where the proceedings on the complaint on points of law were conducted in English, section 1065 (4) of the present draft bill stipulates that the court order is to be translated into German. Other than has been provided for in section 617 (1) sentence 1 of the planned amendment regarding enforceable court decisions issued by the commercial courts, the translation is not to be prepared only if a party so requests, but in all cases and is to comprise the full document. In this way, it is ensured that the provision runs in parallel with section 1063a (1) sentence 2 of the present draft bill, which stipulates that all orders made in English in accordance with section 1063 (1) sentence 1 are to be translated into German. As provided for in section 617 (1) sentence 3 of the planned amendment regarding decisions issued by the commercial courts, it is also stipulated that, in proceedings on complaints on points of law, the translation be inseparably attached to the court order.

Since the Federal Court of Justice as a general rule publishes its decisions, along with its reasons therefor, no statutory duty of publication had to be stipulated for the English-language orders according to section 577 (6) sentence 1 of the Code of Civil Procedure along with their translations into German.

Re Article 2 (Amendment of the Introductory Act of the Code of Civil Procedure)

Article 2 serves to include the transitional provisions for the amendments of the Code of Civil Procedure as section 37c in the Introductory Act to the Code of Civil Procedure (*Gesetz, betreffend die Einführung der Zivilprozessordnung* (EGZPO)). The transitional provisions are aligned with those of Article 3 section 1 of the Act on the Revision of Arbitration Law of 22 December 1997 (published in the Federal Law Gazette I p. 3224) which were transposed, by Article 49 number 5 read in conjunction with Article 52 of the First Act on the Adjustment of Federal Law within the Remit of the Federal Ministry of Justice (*Erstes Gesetz über die Bereinigung von Bundesrecht im Zuständigkeitsbereich des Bundesministeriums der Justiz*) of 19 April 2006 (published in the Federal Law Gazette I p. 866), in section 33 of the Introductory Act to the Code of Civil Procedure.

Re Section 37c (1) of the draft bill of the Introductory Act to the Code of Civil Procedure

Including a transitional provision relating to the effectiveness of arbitration agreements is required in particular in consideration of the limited reintroduction of form-free arbitration agreements. In line with the principles of intertemporal law, section 37c (1) of the draft bill of the Introductory Act to the Code of Civil Procedure stipulates that the effectiveness of arbitration agreements concluded prior to the time at which the present Act entered into force is governed by the laws in force until that point in time.

Re Section 37c (2) of the draft bill of the Introductory Act to the Code of Civil Procedure

Section 37c (2) sentence 1 of the draft bill of the Introductory Act to the Code of Civil Procedure stipulates that arbitral proceedings that have already been commenced at the time the present Act enters into force, but have not yet come to an end, are to be governed by the law in force until that point in time. In keeping with section 33 (2) sentence 2 of the Introductory Act to the Code of Civil Procedure, the parties are free, however, as set out in section 37c (2) sentence 2 of the draft bill of the Introductory Act to the Code of Civil Procedure, to agree to apply the new law.

Re Section 37c (3) of the draft bill of the Introductory Act to the Code of Civil Procedure

Section 37c (3) of the draft bill of the Introductory Act to the Code of Civil Procedure relates to court proceedings. If court proceedings are pending as per the date on which the present Act enters into force, then the current procedural law mandatorily remains applicable to these proceedings.

Re Article 3 (Amendment of the Court Costs Act)

Subsection (7) of the Note regarding number 9005 of the Schedule of Costs appended to the Court Costs Act (*Kostenverzeichnis zum Gerichtskostengesetz* – KV GKG) is to be supplemented by a reference to section 1065 (3) sentence 4 of the Code of Civil Procedure, section 1063a (1) sentence 2 of the Code of Civil Procedure and section 1065 (4) of the Code of Civil Procedure. Section 184b (2) sentence 2 of the draft bill of the Courts Constitution Act, which applies, as a consequence of its being included by reference in section 1065 (3) sentence 4 of the present draft bill, in English-language proceedings on

complaints on points of law before the Federal Court of Justice, provides for the translation of parts of the case files into German. Such a translation is not made in the interests of the parties to the proceedings; instead, it serves no other purpose than to make work easier for the court, which is why the expenditures accruing in this regard are not to be charged to the parties.

Likewise, the expenditures of translating court orders made in English in accordance with section 1063a (1) sentence 2 of the present draft bill and section 1065 (4) of the present draft bill are not to be charged. Said court orders are generally to be published. The costs of the translation are not to be attributed to the parties since it serves the interests of the general public that the court orders are being published.

The clarification made in section 1032 (2) sentence 2 of the present draft bill does not result in any amendments needing to be made to the Court Costs Act. The decision as to the existence or validity of the arbitration agreement is paid for by the fee charged for the proceedings concerning a request filed with the court for a declaratory ruling that establishes the admissibility or inadmissibility of arbitral proceedings (number 1621 of the Schedule of Costs appended to the Court Costs Act).

Nor does the possibility introduced in section 1040 (4) sentence 2 of the present draft bill to have a procedural award set aside under section 1059 of the present draft bill result in any need for follow-on amendments to be made to the Court Costs Act. Since these proceedings are proceedings for the setting aside of an arbitral award, number 1620 of the Schedule of Costs appended to the Court Costs Act will be applicable in future. Since here, just as in accordance with number 1622 of the Schedule of Costs appended to the Court Costs Act (Proceedings in the case of the objection being raised as to the arbitral tribunal lacking jurisdiction), the fee for the proceedings is multiplied by a factor of 2.0, the distinction to be made between the applicable constituent elements for the fees is not an issue with regard to positive or negative decisions by an arbitral tribunal concerning its jurisdiction.

As regards the stipulation in section 1041 (2) sentence 4 of the present draft bill as to an interim measure being set aside in the event of an application to permit enforcement being dismissed, there is no need to amend the Court Costs Act. Setting aside the interim measure is covered by the fee for the dismissal of the application to permit enforcement (number 1626 of the Schedule of Costs appended to the Court Costs Act).

Nor is a corresponding amendment of the Court Costs Act necessary where the newly created request for retrial of the case under section 1059a of the present draft bill is concerned, since this constitutes “proceedings on the setting aside […] of an arbitral award” (number 1620 of the Schedule of Costs appended to the Court Costs Act) and thus, the court costs already provided for in this regard are to be charged.

Re Article 4 (Amendment of the Judicial Remuneration and Compensation Act)

Re Number 1

The supplementation of section 1 (1) sentence 1 number 1 of the Judicial Remuneration and Compensation Act is intended to extend the scope of application to the court reporters instructed according to section 1063a (4) of the present draft bill read in conjunction with section 622 (2) of the present draft bill.

Re Number 2

The supplementation of section 9 (7) of the Judicial Remuneration and Compensation Act is intended to stipulate that the court reporter instructed according to section 1063a (4) of the present draft bill read in conjunction with section 622 (2) of the present draft bill receives

the same remuneration as an interpreter and that all other provisions applicable to the remuneration of an interpreter apply.

Re Article 5 (Entry into force)

According to Article 5, this Act enters into force on the first day of the second quarter following the date of promulgation. This relatively long period of time is justified particularly by the fact that the *Land* governments are to be given sufficient time to prepare should they intend to use their authority to issue statutory instruments as regards commercial courts (section 1062 (5) sentences 2 and 4 of the present draft bill).