

Table of Contents

| | |
|---------------------|-----|
| Abbreviations | XXI |
|---------------------|-----|

| | |
|--------------------|-----|
| Introduction | XXV |
|--------------------|-----|

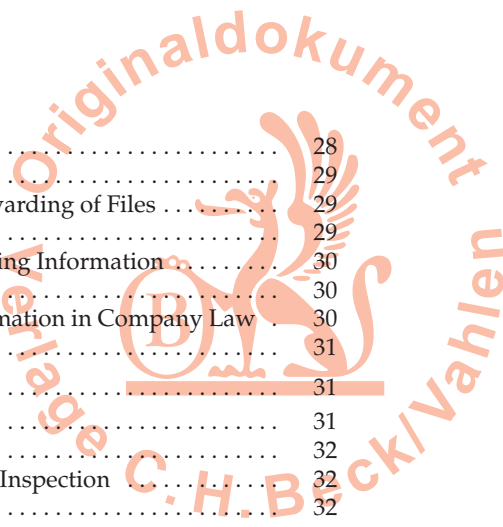
Part 1: Introduction to Commercial Dispute Resolution in Germany

| | |
|--|----|
| Chapter 1: Commercial Litigation | 1 |
| A. Some Features of Litigation in German Courts | 1 |
| B. Basic Elements of the German Civil Justice System | 2 |
| I. The German Civil Law System | 2 |
| II. Sources of Civil Procedure Law | 3 |
| 1. Constitutional Law | 3 |
| 2. Statutes | 3 |
| a. Core Statutes | 3 |
| b. Recent Major Reforms | 4 |
| 3. European Legislation and International Treaties | 4 |
| III. General Principles of Civil Procedure Law | 5 |
| IV. The Acting Persons in German Litigation | 6 |
| 1. The Parties | 6 |
| 2. The Lawyers | 6 |
| a. Education and Training | 6 |
| b. Judges | 6 |
| c. German Attorneys | 7 |
| d. Foreign Attorneys | 7 |
| 3. Court Officers | 8 |
| V. Efficiency of the System | 8 |
| 1. Duration of Proceedings | 8 |
| 2. Litigation Costs | 8 |
| a. Court Costs | 8 |
| b. Attorney Fees | 9 |
| aa. Statutory Fees | 9 |
| bb. Negotiated Fees | 10 |
| c. Reimbursement of Costs | 10 |
| d. Examples | 10 |
| C. The Court System | 10 |
| I. Jurisdictional Branches | 10 |
| II. The Civil Courts | 11 |
| 1. Entry-Level Courts | 11 |
| a. Local Courts | 11 |
| b. Regional Courts | 11 |
| 2. First Appellate Level (<i>Berufung</i>) | 12 |
| a. Regional Courts | 12 |
| b. Higher Regional Courts | 12 |
| 3. Second Appellate Level (<i>Revision</i>) | 12 |
| III. Extraordinary Appeals | 12 |
| 1. Federal Constitutional Court | 12 |

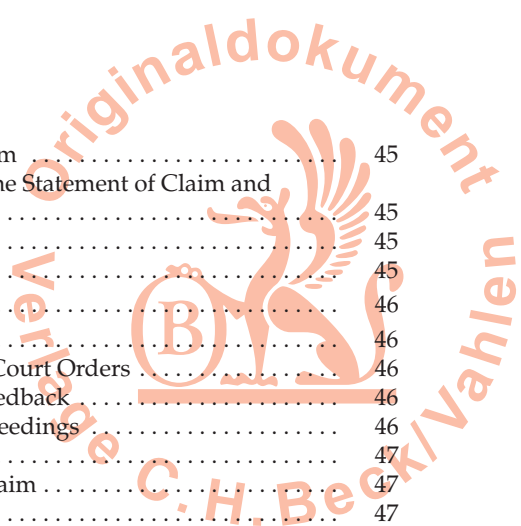
| | |
|---|----|
| 2. European Court of Justice | 13 |
| 3. European Court of Human Rights | 13 |
| D. Jurisdiction | 13 |
| I. Overview: Jurisdiction, Applicable Law, Sovereign Immunity | 13 |
| 1. Jurisdiction | 13 |
| 2. Applicable Procedural Law | 14 |
| 3. Sovereign Immunity | 14 |
| II. Proper Jurisdictional Branch | 15 |
| III. Exclusive Jurisdiction | 15 |
| IV. Agreement on Jurisdiction | 15 |
| V. Jurisdiction by Failure to Raise an Objection | 16 |
| VI. General and/or Special Jurisdiction | 16 |
| 1. General Jurisdiction | 16 |
| 2. Special Jurisdiction | 16 |
| 3. In Particular: Long-arm Jurisdiction | 17 |
| VII. Multiple Jurisdiction and Lack of Jurisdiction | 17 |
| VIII. Jurisdiction Determined by a Superior Court | 18 |
| IX. Forum Shopping and <i>Lis Pendens</i> | 18 |
| X. Challenges to Jurisdiction | 19 |
| 1. Forum Non Conveniens | 19 |
| 2. Anti-Suit Injunctions | 19 |
| XI. Reference to a Valid Arbitration Agreement | 20 |
| E. Pleading in German Litigation | 20 |
| I. General Theory of Pleading | 20 |
| 1. The Concept of “Conclusiveness” | 20 |
| 2. The Method of “Comparative Analysis” | 21 |
| II. Application of the Theory | 21 |
| 1. Principle of Oral Procedure and the Differing Practice | 21 |
| 2. Number and Timeliness of Legal Submissions | 22 |
| 3. Contents of Legal Submissions | 22 |
| a. Statement of Facts | 22 |
| b. Specifying Evidence | 23 |
| c. Pleading the Law | 23 |
| 4. Length and Style of Legal Submissions | 23 |
| F. Fact Finding Prior to Commencing Action | 24 |
| I. General | 24 |
| II. Exploring the Information Available to the Party | 24 |
| 1. Review of Documents, Physical Inspections and Interviews | 24 |
| 2. Use of Commercial Information Providers | 24 |
| 3. Use of Outside Experts | 25 |
| 4. Public Registers | 25 |
| a. Registers to Determine Domicile | 25 |
| b. Company Registers | 25 |
| c. Debtors’ Register | 26 |
| d. Land, Ship, Aircraft and Matrimonial Property Registers | 26 |
| III. Using Inspection Rights for Files Kept at Public Authorities | 27 |
| 1. Files at Regulatory Authorities | 27 |
| 2. Files in the Criminal Justice System | 27 |
| a. Inspection Rights | 27 |
| b. Reporting Alleged Crimes | 28 |



| | |
|---|----|
| 3. Files at the Civil Courts | 28 |
| 4. Files at Other Courts | 29 |
| 5. Requests for Information and for Forwarding of Files | 29 |
| 6. Blocking Inspection Rights | 29 |
| IV. (Expedited) Court Procedures for Obtaining Information | 30 |
| 1. Court Proceedings for Information | 30 |
| 2. Expedited Court Procedures for Information in Company Law | 30 |
| V. Disclosure Proceedings Abroad | 31 |
| G. Preparing and Securing Evidence | 31 |
| I. Preparing Evidence | 31 |
| 1. Means of Evidence | 32 |
| 2. Preparing Documents and Objects for Inspection | 32 |
| 3. Preparing Expert Testimony | 32 |
| 4. Preparing Witness Testimony | 33 |
| a. Securing Potential Witnesses | 33 |
| b. Preparing Witnesses | 33 |
| II. Independent Procedure for the Taking of Evidence | 34 |
| H. Strategy Considerations | 34 |
| I. Selection of Forum | 34 |
| II. Selecting the Right Parties | 35 |
| 1. Plaintiff | 35 |
| a. Assignment of Claim | 35 |
| b. Joinder of Plaintiffs | 36 |
| c. Class or Group Actions | 36 |
| 2. Multiple Defendants | 37 |
| a. Joinder | 37 |
| b. Increased Cost Risk | 37 |
| 3. Third-Party Notice | 38 |
| III. Timing Issues | 38 |
| 1. General | 38 |
| 2. Limitation Period | 38 |
| IV. Choice of Procedure | 39 |
| 1. Collection Proceedings | 39 |
| 2. Summary Proceedings Based on Documentary Evidence or a Bill of Exchange | 40 |
| 3. Action by Stages | 41 |
| 4. Ancillary Procedures | 41 |
| V. Reducing Cost Risks | 41 |
| 1. Action for a Partial Claim Only | 41 |
| 2. Legal Aid | 42 |
| 3. Legal Cost Insurance | 43 |
| 4. Litigation Financing | 43 |
| I. Commencing the Action | 44 |
| I. Filing the Statement of Claim | 44 |
| 1. Contents of the Statement of Claim | 44 |
| a. Specifying the Court and the Parties | 44 |
| b. Specifying the Relief Sought | 44 |
| aa. Relief Available | 44 |
| bb. Motion for Relief | 44 |
| c. Statement of Value of the Matter and Signature | 45 |



| | | |
|------|---|----|
| 2. | Exhibits to the Statement of Claim | 45 |
| a. | Interdependencies between the Statement of Claim and its Exhibits | 45 |
| b. | Foreign-Language Exhibits | 45 |
| 3. | Prepayment of Court Costs | 45 |
| J. | Court Order and Service of Process | 46 |
| I. | The Role of the Court | 46 |
| 1. | Structuring the Proceedings by Court Orders | 46 |
| 2. | Duty to Give Indications and Feedback | 46 |
| II. | Initial Court Order on Further Proceedings | 46 |
| III. | Service of Process | 47 |
| 1. | Initial Service of Statement of Claim | 47 |
| a. | Domestic Service | 47 |
| b. | Service Abroad | 48 |
| c. | Service by Public Notice | 49 |
| d. | Defects of Service | 50 |
| e. | Effects of Service | 50 |
| 2. | Subsequent Service | 50 |
| K. | Possible Responses by Defendant | 51 |
| I. | Defending Against the Action | 51 |
| 1. | Statement of Defense | 51 |
| 2. | Grounds for Defense | 51 |
| a. | Defense on the Merits | 51 |
| b. | Defense by Set-Off | 51 |
| c. | Defense and Counteraction | 51 |
| 3. | Motion for Security for the Costs of the Proceedings | 52 |
| II. | Termination of the Action by Default | 52 |
| III. | Termination of the Action by Acknowledgement of Claim | 53 |
| L. | Third-Party Intervention | 53 |
| I. | Main Third-Party Intervention | 53 |
| II. | Auxiliary Third-Party Intervention | 54 |
| M. | Further Actions by Plaintiff | 55 |
| I. | Further Substantiation of Claim | 55 |
| II. | Amendments and Extension of Claim | 55 |
| III. | Termination by Withdrawal of Action | 56 |
| IV. | Termination of Action by Waiver of Claim | 56 |
| V. | Termination of Action by Declaring the Proceedings Moot | 56 |
| N. | Joint Actions by the Parties | 56 |
| I. | Suspension of Proceedings | 56 |
| II. | Termination of Action by Settlement | 57 |
| 1. | Court Settlement | 57 |
| 2. | Out-of-Court Settlement | 58 |
| O. | Additional Court Orders | 58 |
| I. | Court Orders Designed to Expedite the Proceedings | 58 |
| II. | Court Orders for Joinder of Actions and for Severance | 59 |
| III. | Court Order for Stay of Proceedings | 59 |
| IV. | Disclosure Orders by the Court | 59 |
| 1. | Disclosure Orders for Production of Evidence | 59 |
| 2. | General Disclosure Orders | 60 |



| | | |
|----|---|----|
| P. | Interruption of Proceedings | 61 |
| Q. | The Oral Hearing | 61 |
| | I. General | 61 |
| | 1. Function | 61 |
| | 2. Record of Hearing | 61 |
| | 3. Publicity | 62 |
| | II. Conduct of the Oral Hearing | 62 |
| | 1. Opening of the Hearing | 62 |
| | 2. Conciliation Hearing | 62 |
| | a. Introduction by the Presiding Judge | 63 |
| | b. Pleading and Discussion | 63 |
| | c. Settlement Attempt | 63 |
| | 3. Main Oral Hearing | 63 |
| | a. Asserting the Motions | 63 |
| | b. Pleading and Discussion | 63 |
| | c. Taking of Evidence | 64 |
| | d. Conclusion of the Hearing | 64 |
| R. | Evidentiary Proceedings | 64 |
| | I. General | 64 |
| | 1. Scope of Taking Evidence | 64 |
| | 2. Evidentiary Means | 64 |
| | 3. Order to Take Evidence | 64 |
| | II. Taking Evidence | 65 |
| | 1. Proof by Documentary Evidence | 65 |
| | 2. Proof by Inspection by the Court | 66 |
| | 3. Proof by Third-Party Witness Testimony | 66 |
| | a. Duties of a Witness | 66 |
| | b. Hearing of the Witness | 66 |
| | c. Recording of the Witness Testimony | 67 |
| | d. Remuneration of Witnesses | 67 |
| | e. Probative Value of Witness Testimony | 68 |
| | 4. Proof by Expert Testimony | 68 |
| | a. Appointment of an Expert | 68 |
| | b. Duties of an Expert | 68 |
| | c. Opinion of the Expert | 68 |
| | d. Challenges to the Opinion by the Expert | 69 |
| | e. Remuneration of Experts | 69 |
| | f. Probative Value of Expert Testimony | 69 |
| | g. Expert Witnesses | 69 |
| | 5. Proof by Party Testimony | 70 |
| | a. Note: Hearing of a Party | 70 |
| | b. Party Testimony | 70 |
| | 6. Frustration of Taking Evidence | 71 |
| | III. Privileges | 71 |
| | 1. Party Privilege | 71 |
| | a. Privileges as to Informal Hearings and as to Serving as a Party Witness | 71 |
| | b. Privilege and Disclosure Orders | 71 |
| | 2. Privileges for Third-Party Witnesses | 71 |
| | a. Professional Privilege | 71 |
| | aa. (Former) Corporate Officers | 72 |

| | |
|---|----|
| bb. Bank Secrecy Rules | 72 |
| cc. Professional Advisors | 72 |
| dd. In-house Counsel | 72 |
| ee. Clergy and Media | 73 |
| b. Personal Privilege | 73 |
| aa. Familial Privilege | 73 |
| bb. Privilege to Avoid Financial Harm, Disgrace, or Self-Incrimination | 73 |
| cc. Privilege to Protect Trade Secrets Owned by Third Parties | 73 |
| c. Public Servants Privilege | 74 |
| d. Invoking Privilege | 74 |
| 3. Privilege for Experts | 74 |
| 4. Third-Party Privileges Relating to Orders for Document Production and for Inspection | 75 |
| IV. Evidence Located Abroad | 75 |
| 1. Statutory Sources | 75 |
| 2. Procurement of Evidence by the Court | 75 |
| 3. Requests for Legal Assistance | 76 |
| a. Brussels Evidence Regulation | 76 |
| b. Hague Evidence Convention | 76 |
| 4. Direct Taking of Evidence | 77 |
| 5. Foreign Privileges | 78 |
| V. Evaluation of Evidence and Standard of Proof | 78 |
| S. Establishing the Law | 79 |
| I. German Law and German Private International Law | 79 |
| II. Establishing Foreign Law | 79 |
| T. Judgments | 80 |
| I. Uncontested Judgments | 80 |
| II. Contested Judgments | 81 |
| 1. Types of Contested Judgments | 81 |
| 2. Form and Contents of a Judgment | 81 |
| 3. Corrections of Judgments | 82 |
| a. Apparent Mistakes | 82 |
| b. Objection in the Case of a Violation of the Right to be Heard (<i>Anhörungsriige</i>) | 82 |
| c. Amendments and Supplements | 82 |
| d. Practical Relevance | 83 |
| 4. Service of Judgment | 83 |
| III. Effects of a Judgment | 83 |
| 1. Binding Force on the Court | 83 |
| 2. Binding Effect of a Judgment | 83 |
| 3. Procedures for Setting Aside a Final and Binding Judgment | 84 |
| a. Motion for a New Trial | 84 |
| b. Action for Damages | 84 |
| U. Appellate Remedies | 84 |
| I. General | 84 |
| 1. Overview: Appellate Remedies | 84 |
| 2. General Features of Appellate Remedies | 85 |
| II. First Appeal | 86 |
| 1. Competent Appellate Court | 86 |

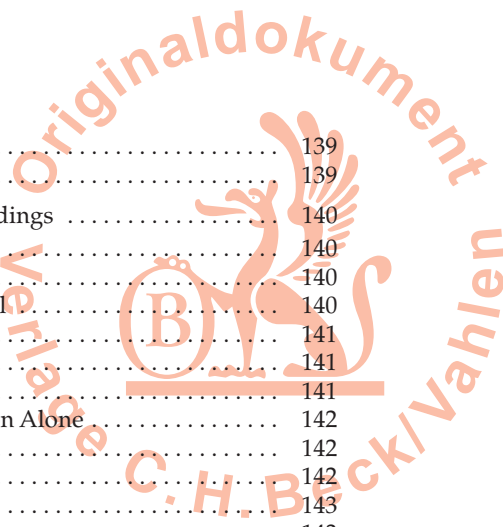
| | | |
|------|---|----|
| 2. | Admissibility of Appeal | 86 |
| a. | Decisions Subject to Appeal | 86 |
| b. | Aggrievement of Appellant | 86 |
| 3. | Waiver of Appeal | 86 |
| 4. | Appellate Written Pleadings | 86 |
| a. | Statement of Appeal | 86 |
| b. | Statement of Grounds for Appeal | 87 |
| c. | Statement of Defense | 87 |
| d. | Withdrawal of Appeal | 87 |
| 5. | Court Orders | 87 |
| a. | Procedural Orders by the Court | 87 |
| b. | Dismissal of Appeal by Court Order | 87 |
| 6. | Scope of Appellate Review | 88 |
| 7. | Judgment | 89 |
| III. | Second Appeal | 89 |
| 1. | Competent Appellate Court | 89 |
| 2. | Admissibility of Appeal | 89 |
| a. | General | 89 |
| b. | Admission of Appeal and Miscellaneous Appeal Against Refusal to Grant Leave to Second Appeal (<i>Nichtzulassungsbeschwerde</i>) | 90 |
| c. | Waiver | 90 |
| 3. | Submissions | 90 |
| a. | Statement of Second Appeal | 90 |
| b. | Statement of Grounds for Second Appeal | 91 |
| c. | Statement of Defense | 91 |
| 4. | Court Orders | 91 |
| a. | General | 91 |
| b. | Court Order for Dismissal | 91 |
| 5. | Scope of Appellate Review | 91 |
| 6. | Judgment | 92 |
| IV. | Miscellaneous Appeal (<i>Beschwerde</i>) | 92 |
| 1. | General | 92 |
| 2. | Immediate Miscellaneous Appeal (<i>sofortige Beschwerde</i>) | 93 |
| a. | Competent Court | 93 |
| b. | Admissibility of Appeal | 93 |
| c. | Submissions | 93 |
| d. | Court Decision | 93 |
| 3. | Miscellaneous Appeal on Points of Law (<i>Rechtsbeschwerde</i>) | 94 |
| a. | Competent Appellate Court | 94 |
| b. | Admissibility | 94 |
| c. | Submissions | 94 |
| d. | Court Decision | 94 |
| V. | Enforcement and Execution of German Judgments | 95 |
| I. | Enforcement and Execution in Germany | 95 |
| 1. | General | 95 |
| 2. | Execution of Monetary Claims | 95 |
| a. | Execution by Garnishment of Claims and Other Proprietary Interests | 95 |
| b. | Execution against Tangible Personal Property | 96 |
| c. | Execution against Real Property | 96 |

| | |
|---|-----|
| aa. Options for a Creditor | 97 |
| bb. Procedure | 97 |
| d. Forced Disclosure Proceedings | 97 |
| 3. Execution of Non-Monetary Claims | 98 |
| a. Delivery or Recovery of Goods | 98 |
| b. Surrendering Possession of Real Property | 98 |
| c. Performance of an Act | 98 |
| d. Refraining from or Acquiescence to an Act | 98 |
| e. Declarations of Will | 98 |
| 4. Remedies in Execution Proceedings | 98 |
| II. Enforcement Abroad | 99 |
| 1. Brussels Regulation | 99 |
| 2. Brussels and Lugano Conventions | 100 |
| 3. Other Standards | 100 |
| W. Provisional Remedies | 100 |
| I. General | 100 |
| 1. Available Provisional Remedies | 100 |
| 2. Practical Aspects | 101 |
| II. Attachment | 101 |
| 1. Application for an Attachment | 101 |
| a. Jurisdiction | 101 |
| b. Motions | 102 |
| c. Attachment Claim | 102 |
| d. Ground for Attachment | 102 |
| 2. Attachment Judgment or Order | 103 |
| 3. Execution | 103 |
| 4. Remedies | 103 |
| III. Preliminary Injunction | 104 |
| 1. Application for a Preliminary Injunction | 104 |
| a. Jurisdiction | 104 |
| b. Motions | 104 |
| c. Injunction Claim | 105 |
| d. Ground for Injunction | 105 |
| 2. Injunction Judgment or Order | 105 |
| 3. Execution | 105 |
| 4. Remedies | 105 |
| IV. No-Fault Liability | 105 |
| V. Enforcement of German Provisional Decisions Abroad | 106 |
| X. Legal Assistance in Aid of Foreign Proceedings | 106 |
| I. Service of Process | 106 |
| 1. Brussels Service Regulation | 106 |
| 2. Hague Service Convention | 107 |
| 3. Other Requests | 107 |
| II. Taking of Evidence in Germany in Aid of Foreign Proceedings | 107 |
| 1. Brussels Evidence Regulation | 107 |
| 2. Hague Evidence Convention | 108 |
| 3. Other International Instruments | 108 |
| III. Information on German Law | 108 |
| IV. Enforcement of Foreign Judgments | 108 |
| V. Provisional Remedies in Aid of Foreign Proceedings | 110 |

| | |
|--|------------|
| 1. European Union | 110 |
| 2. Decisions by Courts Outside the European Union | 110 |
| Chapter 2: Arbitration | 111 |
| A. Introduction | 111 |
| I. Brief History | 111 |
| 1. German Arbitration Law | 111 |
| 2. Legislative Intent Behind New German Arbitration Law | 111 |
| 3. Arbitration in Germany Today | 112 |
| II. Statutory Landscape of German Law on Arbitration | 112 |
| 1. International Treaties | 112 |
| 2. Scope of New Legal Regime | 112 |
| a. Place of Arbitration in Germany | 112 |
| b. Applicability to Arbitration Proceedings Without German Seat | 113 |
| B. The Arbitration Agreement | 114 |
| I. Arbitrability | 114 |
| 1. Disputes Involving an Economic Interest | 114 |
| 2. Disputes Not Involving an Economic Interest | 114 |
| 3. Disputes Not Subject to Arbitration | 114 |
| II. Content Requirement of an Arbitration Agreement | 115 |
| III. Form Requirements | 115 |
| 1. "In Writing" and Signature Requirement under German Arbitration Law | 116 |
| a. Non-consumers | 116 |
| aa. "In Writing" and Signature Requirements for Non-consumers | 116 |
| bb. Arbitration Agreement by Incorporation | 116 |
| cc. Unilateral Arbitration Agreement | 116 |
| b. Consumers | 117 |
| c. Remedying Form Defects in Arbitration Agreement | 117 |
| 2. "In Writing" and Signature Requirement of the New York Convention | 117 |
| C. Constitution and Composition of the Arbitral Tribunal | 118 |
| I. Party Autonomy | 118 |
| II. Number of Arbitrators | 119 |
| III. Appointment of Arbitrators and Chairperson | 119 |
| 1. Qualifications of Arbitrators | 119 |
| 2. Party Autonomy in Appointment of Arbitrators | 119 |
| 3. Default Rules for Appointing Arbitrators | 120 |
| a. Default Rule for Proceeding with Sole Arbitrator | 120 |
| b. Default Rule for Proceeding with Three Arbitrators | 120 |
| 4. Court Intervention in Appointment of Arbitrators | 120 |
| a. Court Appointment of Arbitrators When Nomination Procedures Fail | 120 |
| b. Court Appointment of Arbitrators when Nomination Procedures are Unconscionable | 121 |
| c. Petition to the Court | 121 |
| IV. Multi-Party Arbitration | 121 |
| V. Challenge, Removal and Replacement of Arbitrators | 122 |
| 1. Challenge of an Arbitrator | 122 |

| | | |
|------|--|-----|
| a. | Grounds upon which Arbitrators can be Challenged | 122 |
| b. | Procedure for Challenging an Arbitrator | 123 |
| 2. | Removal of an Arbitrator | 123 |
| 3. | Replacement of an Arbitrator | 124 |
| D. | The Arbitrator's Contract | 124 |
| I. | Arbitrator Contract under German Law | 124 |
| II. | Remuneration of Arbitrator | 125 |
| 1. | Duty to Compensate Arbitrator | 125 |
| 2. | Amount of Fees | 126 |
| 3. | Accrual and Expiration of Claim for Compensation | 127 |
| III. | Liability of Arbitrator – Duties of the Arbitrator(s) | 127 |
| 1. | Liability for Negligence | 127 |
| 2. | Liability for Specific Performance | 127 |
| 3. | No Liability for Decision in Award | 128 |
| E. | Jurisdiction of Arbitral Tribunal | 128 |
| I. | Competence of Arbitral Tribunal to Rule on its Jurisdiction | 128 |
| II. | Interim Measures of Protection | 129 |
| F. | The Arbitral Proceedings | 129 |
| I. | General Rules of Procedure | 129 |
| II. | Place of Arbitration | 130 |
| III. | Language of Arbitral Proceedings | 130 |
| IV. | Exchange of Submissions | 131 |
| 1. | Initiation of Proceedings | 131 |
| 2. | Statements of Claim and Defense | 131 |
| V. | Oral Hearings and Written Proceedings | 131 |
| VI. | Default of a Party | 132 |
| VII. | Establishing the Facts of the Case | 132 |
| 1. | General Approach to Fact Finding and Gathering Evidence | 132 |
| 2. | Documents | 133 |
| a. | Production of Documents in the Possession of a Party | 133 |
| b. | Production of Documents in the Possession of Third Parties | 134 |
| 3. | Witnesses | 134 |
| a. | Written Statements and Testimony | 134 |
| b. | Transcript or Summary of Witness Testimony | 135 |
| c. | Parties as Witnesses | 135 |
| d. | Reimbursement of Witnesses | 135 |
| 4. | Experts | 136 |
| a. | Party-Appointed Experts in Common Law and Court-Appointed Experts in Civil Law | 136 |
| b. | Impartiality and Independence of Tribunal-Appointed Experts | 136 |
| c. | Appointing a Tribunal-Appointed Expert | 137 |
| d. | Duties of a Tribunal-Appointed Expert | 137 |
| e. | Party-Appointed Experts | 137 |
| 5. | Court Assistance in Taking Evidence | 137 |
| a. | Possible Assistance Measures | 137 |
| b. | International Character of ZPO § 1050 | 138 |
| c. | Sanctions Available to German Courts | 138 |
| d. | Competent Court | 138 |
| e. | Requirements for the Application | 138 |

| | |
|---|-----|
| f. Admissibility of a Request | 139 |
| 6. Privileges | 139 |
| G. Making of Award and Termination of Proceedings | 140 |
| I. Rules Applicable to Substance of Dispute | 140 |
| 1. Determination by the Parties | 140 |
| 2. Determination by the Arbitral Tribunal | 140 |
| II. Making of the Award | 141 |
| 1. Majority Voting | 141 |
| 2. Recalcitrant Arbitrator | 141 |
| 3. Decisions on Procedure by Chairperson Alone | 142 |
| III. Form and Contents of Award | 142 |
| 1. Required Contents | 142 |
| 2. Termination of Proceedings by Award | 143 |
| IV. Settlement | 143 |
| 1. Types of Settlement | 143 |
| 2. Form and Contents of Award on Agreed Terms | 144 |
| V. Termination of Proceedings | 144 |
| 1. Types of Awards | 144 |
| a. Final Award | 145 |
| b. Partial Award | 145 |
| c. Interim or Interlocutory Award | 145 |
| 2. Order Terminating the Proceedings | 145 |
| VI. Decision on Costs | 146 |
| 1. Discretion of the Arbitral Tribunal | 146 |
| 2. Costs of the Arbitration | 147 |
| 3. Costs of a Procedural Award | 148 |
| 4. Enforceability of Decision on Costs | 148 |
| VII. Correction and Interpretation of Award; Additional Award | 149 |
| 1. Formal Requirements | 149 |
| 2. Correction and Interpretation | 149 |
| 3. Additional Award | 150 |
| H. Recourse against Award | 150 |
| I. Reasons for Setting Aside an Award | 150 |
| 1. Invalid Arbitration Agreement | 150 |
| 2. Due Process | 152 |
| 3. Excess of Competence or Authority | 152 |
| 4. Improper Composition of the Arbitral Tribunal and Violation of the Procedural Rules Applicable to Arbitration | 153 |
| 5. Public Policy | 153 |
| 6. International Public Policy | 154 |
| II. Procedure and Time Limits | 155 |
| 1. Relationship Between Setting Aside Proceedings and Enforcement Proceedings | 155 |
| 2. Time Limits and Formal Requirements | 156 |
| 3. Content of Decision Setting Aside the Award | 156 |
| I. Recognition and Enforcement of Arbitral Awards | 157 |
| I. Procedure for Enforcement Proceedings | 157 |
| II. Decision on Enforcement | 158 |
| III. Foreign Arbitral Awards | 158 |



| | |
|--|-----|
| Chapter 3: Mediation | 160 |
| A. Introduction to Mediation in German Commercial Disputes Today | 160 |
| B. Statutory Framework | 161 |
| I. International Regulatory Developments | 161 |
| II. Mediation required by German Law | 161 |
| C. Mediation Clauses and Agreements | 162 |
| I. German Law on Mediation Agreements | 162 |
| II. General Terms and Conditions | 163 |
| III. Ignoring an Obligation to Mediate | 163 |
| 1. Duty to Mediate | 163 |
| 2. Commencing Litigation in Contravention of a Mediation Agreement | 163 |
| D. Mediation Proceedings | 164 |
| I. Agreement on Procedures – Aspects to Consider | 164 |
| II. Reference to Rules of a Mediation Institution | 165 |
| III. Mediation and Court Proceedings | 165 |
| 1. Defense of Mediation Agreement | 165 |
| 2. Confidentiality Obligations | 165 |
| 3. Suspension of the Limitation Period | 165 |
| E. Mediator Service Agreement | 166 |
| I. Mediator’s Duties: Rules of Professional Conduct | 166 |
| II. Remuneration of Mediators | 167 |
| III. Liability of Mediators | 168 |
| F. Conclusion of Mediation Proceedings | 168 |
| I. The Agreement | 169 |
| II. Deficient Performance of the Settlement Agreement | 169 |
| III. Enforcement of the Settlement Agreement | 169 |
| 1. Deed drawn up by a German Notary Public | 169 |
| 2. Enforceable Lawyers’ Settlement | 170 |
| 3. Settlement before a State-Approved Conciliatory Center | 170 |
| 4. Court Settlement | 170 |
| 5. Award on Agreed Terms | 170 |

Part 2: Relevant Statutory and Regulatory Materials

| | |
|--|-----|
| A. German Statutory Instruments | 171 |
| I. Code of Civil Procedure of 30 January 1877, last amended on 15 December 2004 (<i>Zivilprozessordnung [ZPO] vom 30. Januar 1877, zuletzt geändert durch Gesetz vom 15. Dezember 2004</i>) (Excerpts) | 171 |
| II. Judicature Act of 27 January 1877, last amended on 22 December 2004 (<i>Gerichtsverfassungsgesetz [GVG] vom 27. Januar 1877, zuletzt geändert durch Gesetz vom 22. Dezember 2004</i>) (Excerpts) | 346 |
| III. Act for the Implementation of International Treaties and for the Implementation of European Community Regulations in the Area of Recognition and Enforcement in Civil and Commercial Matters (Recognition and Enforcement Implementation Act) of 19 February 2001, last amended on 30 January 2002 (<i>Gesetz zur Ausführung zwischenstaatlicher Verträge und zur Durchführung von Verordnungen der Europäischen Gemeinschaft auf dem Gebiet der Anerkennung und Vollstreckung in Zivil- und Handelssachen</i>) | |

| | | |
|-----|---|-----|
| | [Anerkennungs- und Vollstreckungsausführungsgesetz – AVAG] vom 19. Februar 2001, zuletzt geändert durch Gesetz vom 30. Januar 2002) (Excerpts) | 364 |
| IV. | Act on the Implementation of the Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters and the Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters of 22 December 1977 (<i>Gesetz zur Ausführung des Haager Überein- kommens vom 15. November 1965 über die Zustellung gerichtlicher und außergerichtlicher Schriftstücke im Ausland in Zivil- oder Handelssachen und des Haager Übereinkommens vom 18. März 1970 über die Beweisaufnahme im Ausland in Zivil- oder Handelssachen vom 22. Dezember 1977</i>) | 384 |
| B. | EC Regulations | 388 |
| | I. Council Regulation (EC) No. 1348/2000 of 29 May 2000 on the Service in the Member States of Judicial or Extrajudicial Documents in Civil or Commercial Matters | 388 |
| | II. Council Regulation (EC) No. 1206/2001 of 28 May 2001 on Cooperation Between the Courts of the Member States in the Taking of Evidence in Civil or Commercial Matters | 396 |
| C. | Bilateral and Multilateral Treaties | 405 |
| | I. List of Treaties Relevant to International Procedural and Arbitration Law in Germany | 405 |
| | II. Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters of 15 November 1965 | 408 |
| | III. Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters of 18 March 1970 | 414 |
| | IV. Treaty of Friendship, Commerce and Navigation between the Federal Republic of Germany and the United States of America of 29 October 1954 (Excerpts) | 422 |
| D. | German Institutions and Rules for Arbitration | 424 |
| | I. List of Arbitration Institutions in Germany | 424 |
| | II. Arbitration Rules of the German Institution of Arbitration (DIS) of 1 July 1998 | 429 |
| E. | German Institutions and Rules for Mediation | 442 |
| | I. List of Mediation Institutions in Germany | 442 |
| | II. Mediation/Conciliation Rules of the German Institution of Arbitration (DIS) of 1 January 2002 | 444 |
| | III. gwmk Rules of Conduct for Mediators (<i>gwmk-Verhaltensregeln von Mediatoren</i>) | 448 |
| | Appendix 1: Selected Sample Calculations of Fees in German Proceedings . | 457 |
| | Appendix 2: Bibliography | 464 |
| | I. Commentaries and Books in the German Language | 464 |
| | II. Books, Articles and Journals in the English Language | 465 |
| | Appendix 3: German-English Glossary | 467 |