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The language of the proceedings in arbitration

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The significance of the language of the proceedings

As opposed to the case where national proceedings are concerned (Section 184 GVG [German Court Constitution Act]), a specific language is not prescribed in arbitral proceedings. Rather, the language of the proceedings is largely dictated by the will of the parties (Section 1045, para. 1 ZPO [German civil procedure code]).

Before the national courts, the language of the court is German. The provision of Section 184 GVG is currently the subject of ongoing discussion, as the introduction of English-speaking chambers is designed to raise Germany's profile as an international centre for law.[1] Following the 2008 "Law made in Germany"[2] initiative, in 2010 and in 2014, the German Bundestag (the lower chamber of the German parliament) has already considered draft legislation on the introduction of international English-speaking chambers. However, a law has not yet been promulgated to date. Since February 2018, the Bundesrat (upper chamber of the German parliament) has been considering a new initiative[3], which is due to be discussed in the Bundestag.[4]

This article deals with the language in arbitral proceedings ("the language of the proceedings"), which is to be distinguished from the language before the national courts (the "language of the court"). In arbitral proceedings, the language of the proceedings must always be agreed upon or determined, even when the proceedings are conducted exclusively within the domestic territory, i.e. within Germany.[5]

The interest parties may have in expressing themselves in their own or in any case in a familiar language plays just as much a role here as the interest, which may generally be assumed to exist, in conducting proceedings in an expeditious, efficient and cost-effective manner.[6] Savings in terms of time and costs namely represent particular advantages where arbitral proceedings are concerned.[7] Translations can often be dispensable if agreements on the language of the proceedings are in place between parties, which can often have a positive effect on costs as translation expenses will no longer apply.[8]

The choice of the language is by no means merely a formal procedural issue; in fact, it represents the basis for communication, and touches on fundamental principles underlying the proceedings, namely the principle of the right to be heard, the principle of a fair trial, and the principle of the equality of

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[1] *Armbrüster*, ZRP [legal policy journal] 2011, 102.
[2] Cf. in this regard *Wernicke*, NJW [weekly legal journal] 2017, 3038, 3042 et seq.; *Flessner*, NJOZ [online legal journal] 2011, 1913; Law – made in Germany, pub. by BNotK/BRAK/DAV/DRB, 2008, pp. 18 et seq.
[3] BR-Drs. [Printed matters of the *Bundesrat*] 53/18.
[4] BT-Drs. [Printed matters of the *Bundestag*] 19/1717.
[5] MüKoZPO [legal commentary on the German civil procedure code]/*Münch*, 5th ed. 2017, Section 1045 ZPO, margin no. 2; Stein/Jonas/*Schlosser* ZPO, 23rd ed. 2014, Section 1045 ZPO margin no. 1.
[6] *Tercier/Patocchi/Tosssens*, Revue de l'Arbitrage 2016, 749, 751 (in French).
[7] On the costs of arbitral proceedings: *Heinrich*, NZG [legal journal for company law] 2016, 1406, 1409; *Risse/Altenkirch*, SchiedsVZ [legal journal for arbitral proceedings] 2012, 5.
[8] *Schütze*, Schiedsgericht und Schiedsverfahren [arbitral tribunal and arbitral proceedings], 2016, margin no. 496.

arms.[9] The issue of the applicable language and language ability affects all of the parties acting in the respective arbitral proceedings equally, namely the parties and their legal representatives, the arbitral tribunal and ultimately also witnesses and court experts.[10]

In this regard, the choice of language can entail a variety of effects. Being able to express oneself in a familiar language offers both practical and psychological advantages. Giving reasons for one's point of view and substantiating and providing confirmation for it whilst resorting to a foreign language is likely to prove far more difficult than when using one's own native language.[11] For these reasons, the legal framework conditions in relation to the choice of the language of the proceedings in arbitration (**2.**) and potentially arising problems (**3.**) are relevant on a practical level, and therefore represent the focus of this discussion.

Legal framework conditions

In relation to the language of the proceedings, provisions can be found in the respective national laws, i.e. in Germany in the 10th book of the ZPO [German code of civil procedure] (**a)**), and in the respective rules of arbitration (**b)**), which, however, are not distinct from each other in terms of their content.

a) Provisions under the ZPO

The issue of the language of the proceedings is essentially governed by the basic principle of the autonomy of the parties (aa)). In relation to its being determined by the arbitral tribunal, the question arises, on the one hand, as to the competence within the panel of arbitral judges (bb)) and to the scope of the autonomy of the parties on the other (cc)).

aa) The principle of party autonomy

In contrast to the case where the language of the court in national proceedings is concerned, in principle, the language in arbitral proceedings must be agreed upon between the parties. The basic rule for the choice of the language of the proceedings can be found in Section 1045, para. 1, sentence 1 ZPO [German code of civil procedure], the wording of which has been adopted directly from Art. 22 of the UNCITRAL Model Law on International Commercial Arbitration.

According thereto, the parties are free to agree on the language(s) to be used in the proceedings[12]. According to Section 1045, para. 1, sentence 3 ZPO, the agreement then also applies to any written declarations submitted by a party, the hearings, arbitration awards, other decisions, and other communications of the arbitral tribunal. The list is not exhaustive.[13] Section 1045, para. 1, sentence 1 ZPO is to be understood as a further expression of the basic principle laid down in Section 1042, para. 3 ZPO, according to which the parties – who are "in control" of the proceedings [14] – largely determine the course of the proceedings themselves.[15]

In the event that the parties have failed to reach agreement or where there is a lack of an effective agreement between the parties, according to Section 1045, para. 1, sentence 2 ZPO, the arbitral tribunal

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[9] *Barth* in Nedden/Herzberg (pub.), ICC-SchO/DIS-SchO [ICC Rules of Arbitration/DIS (German Arbitration Institute) Arbitration Rules], 2014, Art. 20 ICC-SchO, margin no. 14; also concurring herewith : MüKoZPO/*Münch* ZPO Section 1045, margin no. 1.

[10] Cf. also *Born*, International Commercial Arbitration (Second Edition), p. 2231; cf. re the range of various language problems in arbitral proceedings, with examples: *Ulmer*, Journal of International Arbitration 2011, Vol. 28, Issue 4, p. 295.

[11] *Tercier/Patocchi/Tosssens*, Revue de l'Arbitrage 2016, 749, 752 (in French).

[12] KG [Berlin Court of Appeal] 13/6/2016 – 20 SchH 1/16 = BeckRS 2016 [collection of decisions], 126421;

[13] MüKoZPO/*Münch*, 5th ed. 2017, Section 1045 ZPO, margin no. 12; BeckOK ZPO [online commentary on the German civil procedure code]/*Wilske/Markert* ZPO Section 1045, margin no. 4.

[14] *Saenger*, ZPO, 7th ed. 2017, Section 1045 ZPO, margin no. 2; MüKoZPO/*Münch*, 5th ed. 2017, Section 1045 ZPO margin no. 4.

[15] MüKoZPO/*Münch*, 5th ed. 2017, Section 1045 ZPO, margin no. 4.

shall determine the language that is to be used in the proceedings.[16] The content of this provision corresponds to the general provision relating to procedural issues under Section 1042, para. 4, sentence 1 ZPO[17] and reflects the basic principle of the (merely) subsidiary procedural authority of the arbitral tribunal.[18] The tribunal is by no means entirely free in determining the language of the proceedings, and may not reach an arbitrary decision. In view of the principle of the right to be heard and the principle of equal treatment – it must take into account the interests of both parties when reaching its decision.[19] In the process, the tribunal will take various circumstances into consideration, including among these the language of the contract in particular.[20] The correspondence prior to the conclusion of the contract may also play a role here.[21]

bb) Decision of the arbitral tribunal in relation to the determination of the procedural issue

The issue of whether the language of the proceedings is to be determined by the panel of arbitral judges[22] or whether it is also admissible to refer the decision to the presiding arbitral judge, thus allowing the latter to reach a decision on his or her own[23] within the meaning of Section 1052, para. 3 ZPO is a matter of controversy.

It is right to assume that it is possible for the presiding arbitral judge to reach a decision on his or her own with respect to the determination of the language of the proceedings, and that it is not necessarily the case that a decision in this regard must be reached by all of the members of the arbitral tribunal panel. Due to its implications for the principle of the right to be heard, the determination of the language of the proceedings does indeed represent a fundamental procedural issue. However, this does not stand in contradiction to the wording of Section 1052, para. 3 ZPO, according to which the presiding arbitral judge may decide (only) on "individual" procedural issues alone. The restriction merely serves to establish a limitation to "internal" procedural processes, which explicitly include the determination of the language of the proceedings.[24] By way of the wording "individual procedural issues", the legislator has furthermore sought, in particular, to clearly establish that Section 1052, para. 3 ZPO is not supposed to allow for the granting of a general authorisation to regulate all procedural issues.[25]

cc) Subsequent change in the language of the proceedings by the parties

The question furthermore arises as to the scope of the party autonomy in the context of the determination of the language in question. The issues of whether the parties are entitled to undertake amendments in relation to the language of the proceedings which has been determined by an arbitral tribunal,[26] or whether an agreement between the parties regarding a different language of the proceedings subsequent to the conclusion of the contract is excluded[27] are namely subjects of some controversy. In the event of the subsequent determination of the language of the proceedings, the arbitrator may in any case be entitled to a right of termination on the basis of Section 1038, para. 1,

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[16] MüKoZPO/Münch, 5th ed. 2017, Section 1045 ZPO, margin no 5; KG 13/6/2016 – 20 SchH 1/16 = BeckRS 2016, 126421.
[17] As also stated in MüKoZPO/*Münch*, 5th ed. 2017, Section 1045 ZPO margin no. 1; 3.
[18] *Schwab/Walter*, Schiedsgerichtsbarkeit [arbitration], 7th ed., chapter 16, margin no. 42.
[19] *Berger*, Private Dispute Resolution in International Business: Negotiation, Mediation, Arbitration (2015), Part III, p. 400.
[20] BT-Drs. 13/5274, p. 48 re Section 1045.
[21] Cf. *Barth* in Nedden/Herzberg (pub.), ICC-SchO/DIS-SchO, 2014, Art. 20 ICC-SchO, margin no. 14.
[22] MüKoZPO/*Münch* , 5th ed. 2017, Section 1045 ZPO, margin no. 5; MüKoZPO/*Münch*, 5th ed. 2017, Section 1052 ZPO, margin no. 14.
[23] BT-Drs. 13/5274, p. 54 re Section 1052; Musielak/Voit/Voit Section 1045, margin no. 2; BeckOK ZPO/*Wilske/Markert*, Section 1045, margin no. 3.1; *Schlosser,* SchiedsVZ 2003, 1, 9.
[24] BT-Drs. 13/5274, p. 54 re Section 1052; Zöller/*Geimer ZPO (2017)*, Section 1052, margin no. 7.
[25] *Nedden/Büstgens*, SchiedsVZ 2015, 169, 172.
[26] According to *Saenger*, ZPO, 7th ed. 2017, Section 1045 ZPO, margin no. 2; Langheid/Wandt, 2nd part. *Systematische Darstellungen* [systematic overviews], 1st chapter, *Grundlagen des Versicherungsrechts* [principles of German insurance law], 130. *Schiedsgerichtsbarkeit und Versicherung* [arbitration and insurance], margin no. 58.
[27] According to MüKoZPO/*Münch*, 5th ed. 2017, ZPO Section 1045, margin no. 4.

sentence 1 ZPO in so far as the arbitrator would be hindered in performing its duties by this change in the language of the proceedings due to poor language proficiency in the respective language.[28]

It is correct that the parties are entitled to amend a determination made by the arbitral tribunal. This follows from the fact that the parties are "in control" of the proceedings.[29] The discretionary competence of the arbitral tribunal in relation to the determination of the language of the proceedings within the meaning of Section 1045, para. 1, sentence 2 ZPO does not preclude an entitlement to undertake subsequent amendments, as the meaning and purpose of this provision is that a language of the proceedings is laid down or determined in the first place. An unalterable determination of the language of the proceedings by the arbitral tribunal would not be reconcilable with the principle of party autonomy.[30] In fact, the determination of the language by the arbitral tribunal is subsidiary[31], and the autonomy of the parties takes precedence over the discretion of the arbitrator.[32] Moreover, unlike the parties, the arbitral tribunal itself does not have a legal position of its own that merits protection[33], so that there are no recognisable grounds for the tribunal's determination of the language being unalterable.

b) Provisions under the DIS-Arbitration Rules (Arbitration Rules of the German Arbitration Institute) and the ICC-Arbitration Rules (Arbitration Rules of the International Chamber of Commerce)

According to Art. 20 of the ICC Arbitration Rules, to begin with, an "agreement by the parties" is decisive where the applicable language of the proceedings is concerned. If there is no such agreement, the arbitral tribunal must make a determination with regard to the language of the proceedings. In this context, the tribunal must take various criteria into account when reaching an appropriate decision regarding the language of the proceedings to be applied, wherein the criterion of the language of the contract bears particular significance, as this is the only criterion which is explicitly referred to in Art. 20 of the ICC Arbitration Rules ("[...] due regard being given to all relevant circumstances, including the language of the contract").[34] As the criterion of the language of the contract is also acknowledged by German arbitral tribunals, in terms of content, there is no difference to Section 1045, para. 1 ZPO, even though the latter does not include a reference to the language of the contract.[35] This recourse to the language of the contract on the part of the arbitral tribunal serves to further underpin the prominence of the English language, as many contracts are concluded in English.[36] In fact, the English language represents the language of the proceedings in roughly seventy-five percent of all of the cases before the ICC.[37]

In contrast to the previous provision (§ 6.3 DIS-Arbitration Rules) on the requirements as regards the content of the request for arbitration, Art. 5.2 DIS-Arbitration Rules does not contain any mandatory stipulations for the request in respect to the language of the proceedings. Instead, according to the new version of the rule, the request for arbitration "shall" contain "particulars or proposals regarding the seat of the arbitration, the language of the arbitration, and the rules of law applicable to the merits". However, according to Art. 6.1 DIS-Arbitration Rules, it is not necessary to indicate the language of the

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[28] BeckOK ZPO/*Wilske/Markert* ZPO Section 1045 margin no. 2; AiG [arbitration in Germany] *Sachs/Lörcher*, Section 1045, margin no.2.
[29] *Saenger*, ZPO, 7th ed. 2017, Section 1045 ZPO margin no. 2.
[30] According to *Saenger*, ZPO, 7th ed. 2017, Section 1042 ZPO, margin no. 12; *Lachmann*, Handbuch für die Schiedsgerichtspraxis [arbitration practice handbook], margin no. 750.
[31] *Schwab/Walter*, Schiedsgerichtsbarkeit [arbitration], 7th ed., chapter 16, margin no. 42.
[32] BT-Drs. 13/5274, p. 46 re Section 1042.
[33] *Lachmann*, Handbuch für die Schiedsgerichtspraxis, margin no. 750.
[34] Cf. also *Tercier/Patocchi/Tosssens*, Revue de l'Arbitrage 2016, 749, 769 (in French).
[35] According to *Barth* in Nedden/Herzberg (pub.), ICC-SchO/DIS-SchO, 2014, Art. 20 ICC-SchO, margin no. 5.
[36] *Ulmer*, Journal of International Arbitration 2011, Vol. 28 Issue 4, pp. 295, 307.
[37] *Tercier/Patocchi/Tosssens*, Revue de l'Arbitrage 2016, 749, 772 (in French); *Reiner/Aschauer* in Schütze, Institutional Arbitration – Article-by-Article Commentary, 2013, ICC-Rules, p. 107.

proceedings for the arbitration to "commence", as this is not a minimum requirement in this respect and is not named as a condition for the commencement of the proceeding.

Based on their comparable wording – with the exception of the additional information regarding the language of the contract in the ICC rules – there is no difference between Section 1045, para. 1 ZPO, Art. 20 of the ICC Arbitration Rules and Art. 23 DIS-Arbitration Rules in terms of their regulatory content.[38]

The language of the proceedings in practice

A problem that occurs occasionally in practice is that one party produces evidence without including a translation. Proceeding in this way can be admissible in so far as the parties have made use of their discretionary power with regard to the determination of the language in arbitral proceedings and have agreed upon a provision in this regard (**a)**). If a deviation from the agreed language was not permitted, this can subsequently give rise to problems, and the question arises as to how the submission of a party should be handled where the language of the proceedings has not been observed (**b)**). If the arbitral tribunal hears the case in a language which has not been agreed upon, this constitutes a serious procedural error (**c)**).

a) The language of the proceedings from the perspective of expediency

To begin with, the question arises as to when the language of the proceedings is firmly agreed upon between the parties ((aa)). Another issue to be examined here is the form that a provision on the language of the proceedings, and where applicable the language in relation to the means of evidence, should take (bb)), and, finally, the issue of the language of the proceedings in connection with witness testimony is of relevance here cc)).

aa) Point in time of firm agreement on the language of the proceedings

As explained above, in principle it is also possible to reach a later agreement on the language or, respectively, to subsequently change the language of the proceedings. This raises the question as to whether the inclusion of a detailed regulation of the issue of the language(s) is already indicated when drafting the arbitration clause, i.e. long before a dispute arises. It certainly can make sense to provide in detail for relevant issues beforehand in order to avoid potential disagreement during arbitration. On the other hand, highly detailed provisions can mean that these are vulnerable to being challenged. Extremely specific agreements on language can provide the opponent with an opportunity to "torpedo" proceedings and bring them to a halt if the conditions outlined in the provision are not satisfied to the letter.[39] A number of factors must be taken into consideration when providing for the language of the proceedings. Thus for instance, the language skills of the parties, the language of the contracts and of the applicable law can have a decisive influence on proceedings.[40] Carefully choosing a language for the proceedings can also avoid the potential accumulation of translation costs at a later point in time; according to Section 1057, para. 1 ZPO, these belong to the procedural costs. Avoiding additional translation costs may be advisable above all because the capping of legal fees pursuant to the RVG [German law on lawyer's remuneration] does not apply in arbitral proceedings, and in fact the actual expenses and the respective customary hourly rates apply[41], which, in view of the increase in the volume

[38] According to *Barth* in Nedden/Herzberg (pub.), ICC-SchO/DIS-SchO, 2014, Art. 20 ICC-SchO, margin no. 5; *Barth* in Nedden/Herzberg (pub.), ICC-SchO/DIS-SchO, 2014, §. 22 DIS-SchO, margin no. 3.

[39] Cf. Regarding the disadvantages of highly detailed arbitration agreements: *Risse*, BeckFormB BHW [collection of sample texts in civil, commercial and business law], 1. Schiedsvereinbarung [the arbitration agreement], margin no. 9.

[40] *Kreindler/Harms/Rust* in Heussen/Hamm-BeckRA-HdB [lawyer's handbook], Part A: Prozesse und Verfahren [procedures and proceedings], section 1. Zivilprozess [civil proceedings] § 7. Wahl zwischen ordentlichem Gerichtsverfahren und Schiedsverfahren [the choice between ordinary court proceedings and arbitral proceedings], margin no. 54; *Labes/Lörcher* in Hasselblatt, MAH Gewerblicher Rechtsschutz [lawyer's handbook on industrial property rights], § 7 Außergerichtliche Streitbeilegung [extra-judicial settlement of conflicts], margin nos. 20 et seq.

[41] *Trittmann*, ZVglRWiss [journal of comparative law] 2015, 469, 482.

of work for the lawyer and the complexity of arbitral proceedings, is also appropriate.[42] If additional translation costs are added to this, proceedings can become very expensive.

Firmly agreeing upon the language of the proceedings in advance can have the advantage that the parties are still engaged in contractual negotiations at this point in time (and not yet in a legal dispute) and, so to speak, have positive expectations in relation to each other. Determination of the language in advance can prove disadvantageous, however, when one considers that a certain degree of flexibility can be desirable, as it might only become clear in the course of the implementation of the contract that a number of relevant documents are formulated in a certain language. It should also be borne in mind that the process of interpreting certain clauses can be considerably confounded if the language of the proceedings and the language of the contract are not the same. It may not be possible to predict a range of different circumstances prior to the conclusion of the contract, so that contractual partners cannot always guess, before the contract is being performed, which (procedural) language is likely to prove expedient further down the line. In the case of unusual or particularly rare languages, difficulties may occur when trying to select a suitable arbitrator, as the range of suitable candidates is then considerably reduced.[43] In the final analysis, it can be advisable to plan the proceeding in advance and as a rule also include a provision ahead of time with regard to the language of the proceedings. This can also be changed by the parties in the course of the proceeding.[44]

bb) Flexible provisions on the determination of the language of the proceedings and the language in relation to the means of evidence

A notable problem in practice is the issue of the relationship between the language of the proceedings and the language in which the means of evidence are formulated. In order to effectively account for the aforementioned advantages and disadvantages of providing for the language of the proceedings in advance, one option would be to select a flexible language provision which differentiates between the language of the proceedings and the language in relation to the means of evidence.[45]

It is possible for the parties to reach agreement on the form of a differentiating provision on the language of the proceedings. This can for instance take the form that, although a certain language of the proceedings is determined, documents do not need to be translated in certain cases.[46] Thus, for instance, a "reference clause" could conceivably be agreed upon, which would mean that the translation of documents would not be obligatory where parties have already "referred" to supporting documents. Such a provision would serve to expedite the proceedings and save expenses, as additional translation costs would cease to apply. However, a clause of this kind can also lead to serious conflicts between the parties. For example, a party may unilaterally waive the obligation to translate by referring to a document.

A flexible provision of this nature is also admissible, as it may be assumed that the language of the proceedings and the language in relation to the means of evidence need not necessarily be the same. It can be inferred from the intrinsic legislative logic of Section 1045, para. 1, 2 ZPO that these two types of languages are independent of each other or, respectively, must be distinguished from each other, and that the agreement upon a language of the proceedings specifically does not allow for an automatic conclusion as to the language in relation to the means of evidence. The legislator has drawn a clear

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[42] *Hilgard*, BB [commercial and tax law journal] 2016, 1218, 1226; *Heinrich*, NZG 2016, 1406, 1409; *Saenger/Uphoff*, NJW 2014, 1412, 1416; discussing an alternative view in this regard: *Lachmann*, Handbuch für die Schiedsgerichtspraxis (2008), margin nos. 1974 et seqq.

[43] Cf. regarding advantages and disadvantages of providing for the language of the proceedings in the arbitration agreement: *Tercier/Patocchi/Tosssens*, Revue de l'Arbitrage 2016, 749, 761 (in French); *Barth* in Nedden/Herzberg (pub.), ICC-SchO/DIS-SchO, 2014, § 22 DIS-SchO, margin no. 9.

[44] Stein/Jonas/*Schlosser* ZPO, 23rd ed. 2014, Section 1045, margin no. 1.

[45] On the differentiation between the language of the proceedings and the language in relation to the means of evidence by way of the court determining the respective languages: *Berger*, Private Dispute Resolution in International Business: Negotiation, Mediation, Arbitration (2015), Part III, p. 400.

[46] BeckOK ZPO/*Wilske/Markert* ZPO Section 1045, margin no. 2.

distinction in Section 1045, para. 1, and para. 2 ZPO between the language (of the proceedings) that is to be used in the arbitration proceedings (para. 1), and the language in relation to the "evidence submitted in writing" (para. 2). Regarding the requirements in terms of content where a "reference" is concerned, this should be admissible when the parties have already acknowledged the content of the documents in the past and a translation is not therefore required. Any arising disputes can be avoided by including an additional passage in the provision according to which, in individual cases, the arbitral tribunal can nevertheless request a translation. Translation issues in relation to written means of evidence can also be dealt with in a pragmatic manner. If a number of essentially comparable documents are involved, such as e.g. invoices, in which only the date and the amount vary, it should be sufficient, as a rule, for parties to limit themselves to producing a translation of the document in its basic form.[47]

cc) The language of the proceedings and witness testimonies

In principle, the agreed language of the proceedings also applies to the language in which witnesses give evidence.[48] As a rule, the witnesses must therefore also provide their testimony in the language of the proceedings in so far as this is possible.[49] On the condition that the parties are in agreement, a certain degree of pragmatic flexibility can be expected from the arbitral tribunal in this regard.[50] The list contained in Section 1045, para. 1, sentence. 3 ZPO with respect to the scope of the determined language of the proceedings is provided by way of example[51] and therefore not to be understood as exhaustive. In any case, however, the language of the proceedings also applies to "oral hearings", which, accordingly, also includes witness testimony. In relation to testimony, disputes can arise between parties where the arbitral tribunal allows witnesses to give evidence in their native language, which, in light of the fact that witnesses are often called to appear in proceedings irrespective of whether they want to or not, may be deemed appropriate[52]. At the same time, it is obvious that the necessary translations result in increased outlay in terms of time and expenses. As regards the likelihood of errors and inconsistencies, testimonies provided in a foreign (non-native) language and testimonies provided in the native language but translated are presumably equally susceptible to error. Against this background, again, it becomes clear that the choice of the ("correct") language of the proceedings is dependent upon a number of factors. What is certainly clear in this context is that an improved ability to express oneself can have decisive effects in terms of whether a testimony is deemed convincing and therefore on whether or not a party will prevail in proceedings.[53]

a) Failure to observe the language of the proceedings on the part of the parties to the arbitration

In cases where one party fails to observe the language of the proceedings, the issue of how the submission should be treated in terms of legal consequences when the prescribed language has been disregarded is one of contention.

According to one view, the statement in question is to be deemed irrelevant initially, wherein, however, the court should set an extended deadline for the obtaining of a translation in analogous application of Section 1045, para. 2 ZPO.[54]

According to a different view – in any case when the language has been clearly determined – it should be assumed that the submission is conclusively irrelevant.[55]

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[47] As also stated in *Reiner/Aschauer* in Schütze, Institutional Arbitration, Article-by-Article Commentary, 2013, p. 109.
[48] *Tercier/Patocchi/Tosssens*, Revue de l'Arbitrage 2016, 749, 782 (in French).
[49] *Born*, International Commercial Arbitration (Second Edition), p. 2233.
[50] Lörcher/Lörcher/Lörcher, Das Schiedsverfahren [arbitral proceedings], 2nd ed., margin no. 199.
[51] BeckOK ZPO/*Wilske/Markert* ZPO Section 1045, margin no. 4.
[52] *Tercier/Patocchi/Tosssens*, Revue de l'Arbitrage 2016, 749, 757 (in French).
[53] On tactical/procedural considerations against the background of the choice of language in arbitration proceedings: *Barth* in Nedden/Herzberg (pub.), ICC-SchO/DIS-SchO, 2014, Art. 20 ICC-SchO, margin no. 10; MüKoZPO/*Münch*, 5th ed. 2017, Section 1045 ZPO, margin no. 2.
[54] MüKoZPO/*Münch*, 5th ed. 2017, Section 1045 ZPO, margin no. 15.

When one party fails to observe the prescribed language, a distinction should rightly be drawn as to whether the language of the proceedings has been agreed upon between the parties or determined by the tribunal.[56]

Where there is an agreement in place between the parties, it is to be assumed that the party providing a submission in a foreign language – contrary to the prior agreement – is acting in bad faith within the meaning of Section 242 BGB (German Civil Code)[57], so that the submission need not be taken into account.

The situation is to be assessed differently when the language of the proceedings has been determined by the arbitral tribunal. Here it cannot be assumed conclusively that the statement need not be taken into consideration and rather, in analogous application of Section 1045, para. 2 ZPO, it must be assumed that the tribunal can instruct the party to produce a translation or, respectively, to remedy the omission by then providing the submission in the determined language of the proceedings.[58] The prerequisites for an analogy to this effect[59], i.e. an unintended regulatory gap in the case of a comparable situation in terms of the interests of the parties, are namely present in this context. An unintended regulatory gap is present because the legislator has provided for the authority to issue instructions in relation to the production of translations with respect to documentary evidence and yet has failed to do so with respect to oral submissions in this context. An omission on the part of the legislator must be assumed because the purpose of Section 1045, para. 1 and Section 1045, para. 2 ZPO is to guarantee the right to be heard. The basic principle of the legal right to be heard requires that the party is given the opportunity to make the submission in the correct language of the proceedings at a later date.[60]

The comparable situation in terms of the interests involved arises from the fact that in any case it should be ensured that the evidence is admissible in the proceeding and that the arbitral tribunal and the parties should be in a position to comprehend the matter before them.

By way of teleological extension, Section 1045, para. 2 ZPO also encompasses oral submissions, and allows the arbitral tribunal to set a deadline for subsequent submission. Sections 1045, para. 1 and para. 2 ZPO are intended to enable communication between the parties to the arbitration, and, in particular, should allow the other party to gain knowledge of the content of a statement in the agreed or, respectively, determined language of the proceedings.[61] And by the same token, the principle of the legal right to be heard applies to the party that has provided a submission in the "wrong" language. If one applies these principles to the issue of relevance here, a comparable situation in terms of the interests involved may be presumed to be present. Finally, where the instruction to produce a translation in relation to a piece of documentary evidence or to provide an oral submission in an agreed or determined language of the proceedings is concerned, in both cases what is involved is the introduction to the proceedings of a submission which was not initially comprehensible.

Solving the issue in dispute in this way would appear to do justice to the interests of the parties because even when, as explained above, this only occurs in subsidiary form, a determination of the language of the proceedings by the arbitral tribunal could potentially be contrary to the interests of the parties.

Above all, when the language is determined by the arbitral tribunal, the language of the proceedings is specifically not set in stone. The assessment contained in Section 1042, para. 4 ZPO in relation to general procedural rules in arbitral proceedings moreover speaks in favour of the fact that it should be

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[55] *Saenger*, ZPO, 7th ed. 2017, Section 1045 ZPO, margin no. 2; AiG/Sachs/Lörcher Section 1045, margin no. 12.
[56] As appears to also be confirmed by: Stein/Jonas/*Schlosser*, 23rd ed. 2014, Section 1045, margin no. 2.
[57] MüKoZPO/*Münch*, 5th ed. 2017, Section 1045 ZPO, margin no. 15.
[58] MüKoZPO/*Münch*, 5th ed. 2017, Section 1045 ZPO, margin no. 15; although not referring to an analogous application of Section 1045, para. 2 ZPO nevertheless confirming the possibility of subsequent submission: Stein/Jonas/*Schlosser*, 23rd ed. 2014, Section 1045 ZPO, margin no. 2.
[59] Cf. re analogy with further references, *Heussen*, NJW 2016, 1500.
[60] Stein/Jonas/*Schlosser* ZPO, 23rd ed. 2014, Section 1045 ZPO, margin no. 2.
[61] Lachmann, margin no. 757.

possible to provide the submission at a later date. If, namely, a (language) provision has not been agreed upon between the parties and there is no provision under the ZPO, the procedural rules are determined, in principle, by the arbitral tribunal at its own discretion; this is also referred to as the "limited inquisitorial principle" (in German "*beschränkter Untersuchungsgrundsatz*").[62] The tribunal is therefore to be accorded discretion to the effect that it may set a deadline for the filing of the submission at a later date.

c) Failure to observe the language of the proceedings on the part of the arbitral tribunal

In cases where, contrary to a prior agreement between the parties, the arbitral tribunal hears the case in a different language, this would presumably give rise to grounds for reversal within the meaning of Section 1059 ZPO, and would thus mean that the arbitration award would potentially be reversible. In view of the violation of the legal right to be heard, if the tribunal fails to observe the language of the proceedings this could either bear relevance or could represent a procedural error. If it is presumed that the legal right to be heard is violated, the reversal ground under Section 1059, para. 2, no. 1 b) ZPO would apply; in the case of errors occurring in arbitral proceedings, the reversal ground under Section 1059, para. 2, no. 1 d) ZPO could be applicable.

According to one view, a ground for reversal within the meaning of Section 1059, para. 2, no. 1 b), alternative 2 ZPO applies here (under the aspect of a violation of the right to be heard).[63] If, then, in the context of the breach of the obligation to observe the language of the proceedings, one argues on the basis of a denial of the legal right to be heard within the meaning of Section 1059, para. 2, no. 1 b) ZPO, it should be noted that this does not represent an absolute ground for reversal but rather means that the denial of the legal right to be heard must in fact have borne relevance for the decision.[64]

According to another view, the violation of the obligation to observe the language of the proceedings on the part of the arbitral tribunal must be viewed against the background of Section 1059, para. 2, no. 1 d), half sentence 1, alternative 2 ZPO. It cannot namely be excluded that the tribunal may have been wrongly understood, a party has accordingly reacted in the wrong way, and that this has therefore affected the arbitral award within the meaning of Section 1059, para. 2, no. 1d), end section, ZPO as a result of a procedural error.[65] According hereto, a reversal ground would always be present.

The question is further raised in the pertinent literature as to whether a defect in relation to the language of the proceedings can be remedied. In arbitral proceedings[66], in principle, prior immediate objection or, respectively, objection within a set deadline period is required for the assertion of a procedural defect (Section 1059, para. 2, no. 1 d) ZPO), which can be inferred from Section 1027, sentence 1 ZPO. This means that – if the defect is not immediately asserted – it cannot be cited by a party at a later point in time, and that therefore there is a possibility of remedy. Bearing relevance here where the possibility of remedy is concerned is whether or not the party is obliged to file an objection when the arbitral tribunal has failed to observe the language of the proceedings.

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[62] Cf. in relation to "beschränkten Untersuchungsgrundsatz" [limited inquisitorial principle]: *v. Bernuth*, SchiedsVZ 2018, 277, 278; MüKoZPO/*Münch,* 5th ed. 2017, Section 1045 ZPO, margin no. 15; Zöller/*Geimer*, 31st ed. 2016, Section 1042, margin no. 30 with further references.

[63] MüKoZPO/*Münch*, 5th ed. 2017, Section 1045 ZPO, margin no. 16.

[64] *Schütze*, Schiedsverfahrensrecht [arbitration law] (2016), margin no. 774; MüKoZPO/*Münch,* 5th ed. 2017, Section 1059 ZPO, margin no. 33.

[65] Also speaking in favour of a reversal ground pursuant to no. 1d: *Barth* in Nedden/Herzberg (pub.), ICC-SchO/DIS-SchO, 2014, Art. 20 ICC-SchO, margin no. 2.

[66] The basic principle of the procedural preclusion of an objection arises from Section 1027 ZPO. For ICC proceedings, this follows from Art. 40, ICC Rules of Arbitration (ICC-SchO) (2017) and for DIS proceedings, Art. 43 DIS-SchO (2018), which now not only covers agreements between parties but also other provisions.

According to one view[67], in the event of a violation on the part of the tribunal, the possibility of remedy exists when the irregularity in the form of the failure to observe the language of the proceedings has not been objected to within the meaning of Section 1027 ZPO. Arising herefrom, then, is the duty to object[68] where the tribunal has failed to observe the language of the proceedings.[69]

According to another view[70], where the language of the proceedings has not been observed, a duty to object within the meaning of Section 1027 ZPO does not apply by way of exception, so that – in the event that a party waives the right to object – the defect cannot be remedied. This is because a general, binding requirement is at issue, which would (certainly appear to) make the violation particularly significant.[71]

The former view deserves to take preference here. In the event that the arbitral tribunal has failed to observe the language of the proceedings, a duty to object[72] applies, and, accordingly, if no objection has been filed, the possibility of remedy also applies. It is indeed the case that the language of the proceedings is extremely significant for the proceedings as a whole, and – as has been shown – that it bears a considerable influence upon their outcome. However, this cannot give rise to grounds for waiving duty to object.[73] Rather, a prior objection within the meaning of Section 1027 ZPO is also required in cases where the arbitral tribunal has failed to observe the language of the proceedings, as the duty to object is intended to serve as an instrument of balance between the right to a decision which is correct under procedural law and the expedition of the proceedings.[74]

Conclusion

In contrast to the case where national proceedings are concerned, the language of the proceedings in arbitration is not stipulated under statutory law and, in particular, is not tied to the place where the dispute is conducted. Rather, it is either agreed upon between the parties themselves or determined, on a subsidiary basis, by the arbitral tribunal. The provision pertaining to the language of the proceedings under Section 1045 ZPO is a manifestation of the central principle prevailing in arbitral proceedings, namely that of the autonomy of the parties. This principle allows the parties to react with flexibility to the requirements of the respective proceeding in question, and to agree upon a language provision which reflects their needs. As this principle touches on the issue of the legal right to be heard and the principle of the equality of arms, observing and adhering to the language of the proceedings is not merely a matter of form; it can in fact have profound effects upon the proceedings as a whole. Above all in relation to the consequences resulting from errors in this regard, there is much that is not yet clarified or is contentious in the pertinent literature, so that agreement upon a prior provision in relation to the language in question is strongly recommended.

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[67] Musielak/Voit/Voit Section 1045 ZPO, margin no. 4.
[68] On the duty to object according to § 41 DIS-SchO, old version.: *Barth* in Nedden/Herzberg (pub.), ICC-SchO/DIS-SchO, 2014, § 22 DIS-SchO, margin no. 2; on the duty to object according to Art. 39 ICC Rules of Arbitration: *Barth* in Nedden/Herzberg (pub.), ICC-SchO/DIS-SchO, 2014, Art. 20 ICC-SchO, margin no. 2.
[69] Musielak/Voit/*Voit* ZPO Section 1045, margin no. 4; AiG/Sachs/Lörcher Section 1045, margin no. 13.
[70] MüKoZPO/*Münch*, 5th ed. 2017, Section 1045 ZPO, margin no. 16.
[71] MüKoZPO/*Münch*, 5th ed. 2017, Section 1045 ZPO, margin no. 16.
[72] Zöller/*Geimer*, 31st ed. 2016, Section 1059, margin no. 44a; *OLG* [Higher Regional Court of] *Cologne*, SchiedsVZ 2014, 203; *OLG Munich* SchiedsVZ 2010, 169, 172 = OLGR [Higher Regional Court Report] 2009, 679, 681.
[73] Arguably of a different opinion here: MüKoZPO/*Münch*, 5th ed. 2017, Section 1045 ZPO, margin no. 16.
[74] BeckOK ZPO/Wolf/Eslami Section 1027 ZPO, margin no. 1.

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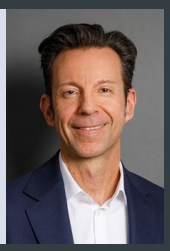

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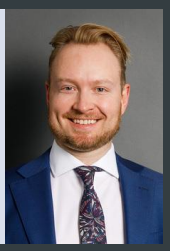

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