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Duties of Confidentiality of an Arbitrator from the German Perspective

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Introduction

Arbitrators may be facing a situation where they either hear about financial transactions that, from their viewpoint, may be "not quite kosher" or where they learn about crimes or offenses; such situation may also give the impression that the entire "litigious" arbitration proceedings were only conducted for the purpose of creating an amicable "mock transaction", triggering a "mock fight" about the facts of the case

Arbitrators may be facing a situation where they either hear about financial transactions that, from their viewpoint, may be "not quite kosher"[1] or where they learn about crimes or offenses[2]; such situation may also give the impression that the entire "litigious" arbitration proceedings were only conducted for the purpose of creating an amicable "mock transaction", triggering a "mock fight" about the facts of the case. The objective is to lead the arbitration court to render an arbitral award, which later should serve as a legitimate basis for transactions, for instance for money laundering or antitrust arrangements.[3] An arbitral award or an arbitral settlement is supposed to constitute a basis for legitimacy for payment transactions or market collusions that would otherwise not to be justifiable.[4]

In both scenarios, arbitrators will be challenged by the question whether they are allowed to engage themselves in such transaction and whether such transaction is subject to a duty of secrecy and confidentiality.[5]

This article will provide, from the perspective of German law, an overview of the duties of confidentiality of arbitrators; the subsequent sections will focus on the limitations of such duty of confidentiality and whether or not an arbitration court must forgo confidentiality or may relinquish confidentiality. The article concludes with final considerations.[6]

1 Such as: Corruption or bribery payments. It should be noted in this context that, under German law, an arbitral agreement is independent of the agreement on which the arbitration proceedings is based (separation principle, § 1040 (1) sentence 2 ZPO [German Code of Civil Procedure]); even if the main contract should be void pursuant to §§ 134, 138 BGB (German Civil Code), the validity of an arbitration agreement will not be affected.

2 Such as: bribe money.

3 An invalidity of the main contract shows through on an arbitration agreement if it is actually an arbitration proceedings that makes a corruption payment possible or conceals such payment, cf. Lachmann, Handbuch für die Schiedsgerichtspraxis, 3rd Ed. 2008, margin no. 535 *et seq.*; Schwab/Walter, Schiedsgerichtsbarkeit, 7th Ed. 2005, Chapter 4 margin no. 17 *et seq.*; Rieder/Schoenemann, NJW 2011, 1169 *et seq.*

4 Comparable situations are, for instance, conflicts between two competitors trying to legitimate a conduct that is contrary to antitrust laws (such as the division of a territory) by way of an "authorized" arbitral award.

5 In this article, questions of bias and perspective are not dealt with. For this topic, see Hilgard, BB 2015, 456 *et seq.*

6 A German language article on this topic can be found in BB 2015, 1091 *et seq.* Whether the considerations in this article can be applied on a tribunal acting as an *amiable compositeur* (see Hilgard/Bruder, DRI May 2014, pp 51-62) remains to be seen. As regards the nature and scope of a party's disclosure obligations in proceedings instituted in Germany see Hilgard, Die Justiz 2003, 572 *et seq.* The scope of the legal professional privilege of communication with in-house counsel is addressed by Hilgard, CH-D Wirtschaft 12/07 and 4/08; DAJV Newsletter 2008, 23 *et seq.*

Duty of confidentiality of arbitrators in arbitration proceedings

A contract – The legal basis for the duty of confidentiality

It is the arbitration agreement – whether concluded in writing or orally – that defines the legal relationship between the parties and the arbitrators; under German law, such agreement is subject to either § 662 *et seq*. BGB (German Civil Code) or § 611 *et seq*. BGB, or is qualified as a "contract *sui generis*". In any case, the arbitration agreement is a contract under the German law of obligations. It depends on the decision of the contractual partners, that is, the parties to the agreement, whether or not the agreement is subject to a duty of confidentiality of the arbitrators. It is generally accepted that an arbitrator contract justifies a duty of confidentiality for the arbitrators even if the contract does not contain any express confidentiality provisions.[7] An abstract assessment on whether or not this view is correct can only be provided if, at the same time, it is evident who has an interest in, and enjoys the protection of, such duty of confidentiality.

The general view is that the duty of confidentiality serves the interest of the parties: when they conduct arbitration proceedings, they purportedly disclose potentially confidential information to the arbitration court the dissemination of which they usually do not desire.[8] If this is in fact the case, the parties would of course be free to release the arbitrators from a duty of confidentiality.

Such waiver would of course have to be expressed by all parties. This follows from the fact alone that the relevant arbitration contract was entered into with all parties.

The above considerations are valid only as regards confidentiality concerns of the parties. Another view taken is that the arbitrators are obliged also to comply with the duty of confidentiality *vis-à-vis* their respective co-arbitrators[9] as in this case the secrecy of the deliberations of the arbitration court is purportedly opposed to the provision of information:[10] The secrecy of deliberation of the arbitral tribunal allegedly constitutes the elements of confidentiality among the arbitrators, and allegedly obliges every arbitrator to secrecy just as it obliges every judge of a state court. This is an essential procedural principle; the independence of the arbitral tribunal is guaranteed only if the secrecy of deliberation is kept and the decision is thus not influenced by external factors.[11] If one follows this view, the secrecy of deliberation does not only protect the parties but also constitutes the right of each and every arbitrator.[12] As the secrecy of deliberations is considered to be "inalienable", it cannot be waived by the arbitrators.

Institutional provisions on the confidentiality of arbitrators

National institutional regulations

When national arbitration rules are agreed, the duty of confidentiality of an arbitrator follows, for instance, from section 43.1 of the DIS Rules of Arbitration,[13]

It is generally accepted that an arbitrator contract justifies a duty of confidentiality for the arbitrators even if the contract does not contain any express confidentiality provisions

7 For instance, Greger, in: Zöller, ZPO, 30th Ed. 2014, § 1035 margin no. 31 and § 1052 margin no. 5; Lachmann, Handbuch für die Schiedsgerichtspraxis, 3rd Ed. 2008, margin no. 145, margin no. 1695 and margin no. 4289 *et seq.*; Münch, in: Münchener Kommentar, ZPO, 4th Ed. 2013, § 1034 margin no. 25 and § 1052 margin no. 3 *et seq.*; Prütting, in: Festschrift für Böckstiegel, 2001, p. 629, 633; Schütze, Schiedsgericht und Schiedsverfahren, 5th Ed. 2012, margin no. 67; Voit, in: Musielak, ZPO, 11th Ed. 2014, § 1035 margin no. 24; Haller, SchiedsVZ 2011, 179.

8 Cf. for instance Haller, SchiedsVZ 2011, 179.

9 For instance Greger, in: Zöller, ZPO, 30th Ed. 2014, § 1035 margin no. 31 and § 1052 margin no. 5; Lachmann, Handbuch für die Schiedsgerichtspraxis, 3rd Ed. 2008, margin no. 145, margin no. 1695 and margin no. 4289 *et seq.*; Münch, in: Münchener Kommentar, ZPO, 4th Ed. 2013, Vor §§ 1034 *et seq*, margin no. 25 and § 1052 margin no. 3 *et seq.*; Prütting, in: Festschrift für Böckstiegel, 2001, p. 629, 633; Schütze, Schiedsgericht und Schiedsverfahren, 5th Ed. 2012, margin no. 67; Voit, in: Musielak, ZPO, 11th Ed. 2014, § 1035 margin no. 24; Haller, SchiedsVZ 2011, 179. Cf. also Paragraph II section 1.

10 On secrecy of deliberations of the arbitration court, cf. for instance BGH Z23, 138, 140 *et seq*; Geimer, in: Zöller, loc. cit. § 1035 margin no. 35; Lachmann, Handbuch für die Schiedsgerichtspraxis, 3rd Ed. 2002, margin no. 4289; Münch, in: Münchener Kommentar, loc. cit. § 1052, margin no. 5; Schütze, SchiedsVZ 2008, 10, 13; Wais, in: Schütze/Tscherning/Wais, Handbuch des Schiedsverfahrens, 2nd Ed. 1990, margin no. 518; Haller, SchiedsVZ 2011, 179, 181.

11 Haller, SchiedsVZ 2011, 179,180 *et seq.*

12 BGHZ 23, 138, 140; OLG Düsseldorf EWIR 1988, 623 with references, Körber; Geimer, in: Zöller, loc. cit. § 1035 margin no. 31.

13 Art. 43.1 of the DIS Rules stipulates as follows: "*The parties, the arbitrators and the persons at the DIS Secretariat involved in the administration of the arbitral proceedings shall maintain confidentiality towards all persons regarding the conduct of arbitral proceedings, and in particular regarding the parties involved, the witnesses, the experts and other evidentiary materials. Persons acting on behalf of any person involved in the arbitral proceedings shall be obligated to maintain confidentiality.*" Cf. for instance Theune in: Schütze, Institutionelle Schiedsgerichtsbarkeit, 2nd Ed. 2011, § 43 DIS.

Art. 44 of the Swiss Rules of Arbitration,[14] from Art. 46 of the Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (SCC), and from Art. 30.2 of the LCIA Arbitration Rules and Art. 34 of the ICDR Rules of Arbitration.[15]

The ICC Rules of Arbitration

No confidentiality provision is contained in the ICC Rules of Arbitration. Art. 6 of their Annex I (Statutes of the International Court of Arbitration), however, contains such a provision.[16] In addition, Annex II (Regulations of the International Court of Arbitrations) contains provisions regarding confidentiality. In Art. 1, for instance, details on the confidential character of the procedures of the court of arbitration are defined, and Art. 2 contains a description of the regulations on the participation of the members of the court of arbitration in ICC arbitration proceedings. All this suggests that the ICC Rules solely oblige employees of the ICC, but not its arbitrators, to confidentiality.[17]

Irrespective of whether institutional or any other comparable provisions on confidentiality apply, there is the view that a duty of confidentiality already follows – explicitly or implicitly – from the arbitrator contract

A duty of confidentiality is affirmed as inherent to arbitration even if the proceedings are not *per se* confidential or secret

14 Art. 44 of the Swiss Rules stipulates as follows: "*1. Unless the parties expressly agree in writing to the contrary, the parties undertake to keep confidential all awards and orders as well as all materials submitted by another party in the framework of the arbitral proceedings not already in the public domain, except and to the extent that a disclosure may be required of a party by a legal duty, to protect or pursue a legal right, or to enforce or challenge an award in legal proceedings before a judicial authority. This undertaking also applies to the arbitrators, the tribunal-appointed experts, the secretary of the arbitral tribunal, the members of the board of directors of the Swiss Chambers' Arbitration Institution, the members of the Court and the Secretariat, and the staff of the individual Chambers.*
2. The deliberations of the arbitral tribunal are confidential.
3. An award or order may be published, whether in its entirety or in the form of excerpts or a summary, only under the following conditions:
(a) A request for publication is addressed to the Secretariat;
(b) All references to the parties' names are deleted; and
(c) No party objects to such publication within the time-limit fixed for that purpose by the Secretariat."
In this regard, see for instance Karrer, in Schütze, Institutionelle Schiedsgerichtsbarkeit, 2nd Ed. 2011, Art. 44 of the Swiss Rules of International Arbitration.

15 Art. 37 (1) of the ICDR Arbitration Rules stipulates as follows: "*Confidential information disclosed during the arbitration by the parties or by witnesses shall not be divulged by an arbitrator or by the Administrator. Except as provided in Article 30, unless otherwise agreed by the parties or required by applicable law, the members of the arbitral tribunal and the Administrator shall keep confidential all matters relating to the arbitration or the award.*" In this regard cf. Thümmel in: Schütze, Institutionelle Schiedsgerichtsbarkeit, 2nd Ed. 2011, Art. 34 AAA-IAR.

16 Art. 6 of Annex I of the ICC Rules reads as follows: "*The work of the Court is of a confidential nature which must be respected by everyone who participates in that work in whatever capacity. The Court lays down the rules regarding the persons who can attend the meetings of the Court and its Committees and who are entitled to have access to materials related to the work of the Court and its Secretariat.*"

17 Also Haller, SchiedsVZ 2011, 179 *et seq.*

The Vienna Rules

The Vienna Rules[18] do not provide for a duty of confidentiality on the part of the arbitrators, either.

Lack of contractual or institutional provisions

Irrespective of whether institutional or any other comparable provisions on confidentiality apply, there is the view that a duty of confidentiality already follows – explicitly or implicitly – from the arbitrator contract.[19] The view is taken that the duty of an arbitrator to keep confidentiality with respect to the proceedings and to the facts that become known to the arbitrators in the course of the proceedings, is an inherent element of arbitration.[20] A duty of confidentiality is affirmed as inherent to arbitration even if the proceedings are not *per se* confidential or secret.

Scope of the duty of confidentiality

§ 1035 ZPO (Code of Civil Procedure) stipulates that arbitrators are subject to the duty of confidentiality not only with respect to the content and the course of the deliberations, but also as regards all circumstances and facts that have become known to the arbitrators in their capacity as arbitrators.[21] For lack of an agreement to the contrary, arbitrators must keep the secrecy of deliberations (including the voting result); their interrogation as a witness as to the course of the deliberations is inadmissible.[22] Sometimes, the view is taken that even a dissenting opinion of one individual arbitrator requires an express approval in the agreement between the parties and the consent of the other arbitrators for violation of the secrecy of deliberations.[23]

18 Cf. also Art. 30 of the Vienna Rules.

19 Haller, SchiedsVZ 2011, 179.

20 For instance Greger, in: Zöller, ZPO, 30th Ed. 2014, § 1035 margin no. 31 and § 1052 margin no. 5; Lachmann, Handbuch für die Schiedsgerichtspraxis, 3rd Ed. 2008, margin no. 145, margin no. 1695 and margin no. 4289 *et seq.*; Münch, in: Münchener Kommentar, ZPO, 4th Ed. 2013, Vor §§ 1034 *et seq.*, § 1034 margin no. 25 and § 1052 margin no. 3 f.; Prütting, in: Festschrift für Böckstiegel, 2001, p. 629, 633; Schütze, Schiedsgericht und Schiedsverfahren, 5th Ed. 2012, margin no. 67; Voit, in: Musielak, ZPO, 11th Ed. 2014, § 1035 margin no. 24; Haller, SchiedsVZ 2011, 179.

21 Voit, in: Musielak, ZPO, 11th Ed. 2014 § 1035 margin no. 24.

22 Stein/Jonas/Geimer in: Zöller, loc. cit. § 1053 margin no. 5; § 1035 margin no. 31.

23 Cf. Lachmann, loc. cit. margin no. 1775; Geimer, in: Zöller, loc. cit. § 1053 margin no. 5; Schütze, loc. cit. margin no. 434; Schütze, SchiedsVZ 2008, 10, 13; Peltzer, Die Dissenting Opinion in der

Professional duty of confidentiality?

Arbitrators that work full-time as a lawyer, a notary, or a judge are, when sitting as an arbitrator, not subject to the professional duties of confidentiality applicable to this occupational group.

Limitations of the duty of confidentiality

Right to refuse testimony protects the "secrecy of deliberations"

Under German law, it is generally perceived that the secrecy of deliberations of arbitrators is protected by § 383 (1) no. 6 ZPO (Code of Civil Procedure).[24] Accordingly, arbitrators are persons "*to whom facts are entrusted, by virtue of their office, profession or status, the nature of which mandates their confidentiality, or the confidentiality of which is mandated by law, where their testimony would concern facts to which the confidentiality obligation refers*". If arbitrators for personal reasons do not want to exercise their right to refuse testimony, § 383 (3) ZPO will apply. This provision stipulates that even if persons do not refuse to testify, an examination "*is not to be aimed at facts and circumstances regarding which it is apparent that testimony cannot be rendered without breaching the confidentiality obligation*".

"Entrusted" not only refers to facts and circumstances that arbitrators learned from a "confidential" information, but also to the acquisition of knowledge of all objectively confidential facts and circumstances in connection with the activities as an arbitrator. In this context, it is interesting that the secrecy of deliberations, that is, details on the deliberations and the vote, protects the arbitrators, but not the parties, so that consequently the parties cannot grant a release from the duty of confidentiality.[25] The secrecy of deliberations serves an early decision finding of the arbitral tribunal and, therefore, also the protection of the arbitrators. With respect to the secrecy of deliberations of permanent judges at state courts, the German Federal Supreme Court (*Bundesgerichtshof, BGH*)[26] explained that this secrecy had to be determined (and had "*per se* to be observed") not only in the interests of the parties but rather irrespective of their wishes, "apart from exceptional cases as they are not on hand in the arbitration proceedings at issue". The BGH further stated that naturally arbitrators as well have their own legitimate interest in not being obliged – for instance on the basis of a subsequent suspension of the obligation of secrecy by the parties – to render a witness statement on the details of the deliberations and considerations of the tribunal on which the arbitral award is based, hence on any details other than those provided in the reasoning of the arbitral award. It is essential that the secrecy of deliberation be maintained. Only if a waiver would be announced by all persons involved – all arbitrators and the parties – one could discuss whether this is admissible.

Right to refuse to be heard as an expert

Arbitrators remain to have the right to refuse to be heard as an expert even after their appointment has come to an end.[27] However, the relevant provision of German law is considered a recommendation or a directory statute (compliance with it is designated as "honourable obligation"). The legislator intends that a person involved in an arbitral decision should not be examined as a witness *via* a "detour" of a hearing, as expert on the questions that are the subject of the arbitral decision.

Inadmissibility

In accordance with a decision of the German Federal Supreme Court,[28] the examination of arbitrators as witnesses on the purpose of their arbitral awards is usually inadmissible; this also applies to situations where the parties have released the arbitrators from keeping their secrecy of deliberations.[29]

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Schiedsgerichtsbarkeit, 1999; Westermann, SchiedsVZ 2009, 102; Uff/Noussia, in: Festschrift Kerameus, 2009, 1467; Westermann, in: Festschrift Kerameus, 2009, 1571. Convincing, Bartels, SchiedsVZ 2014, 133 *et seq*.

24 Damrau, in: Münchener Kommentar, ZPO, 4th Ed. 2013, § 376 margin no. 3, § 383 margin no. 39.

25 Pursuant to § 385 (2) ZPO, Damrau, loc. cit. § 383 margin no. 39. Similarly, OLG Düsseldorf EWiR 88, 623 with reference Karber; Prütting, in: Festschrift Schwab, 1990, 418; Geimer in: Zöller, loc. cit. § 1035 margin no. 31; Baumbach/Lauterbach/Albers/Hartmann, ZPO, 27th Ed. 2014, annex. § 1035 margin no. 9.

26 NJW 1957, 592.

27 As stipulated in § 408 ZPO.

28 BGH NJW 1957, 592.

29 Confirmation by RGZ 129, 15. For privileges and exceptions to disclosure under German law see, for example, Hilgard, Electronic Discovery Deskbook, Chapter 14.

In contrast to state court proceedings, a review of the arbitration proceedings by the higher regional court does not constitute a continuation of the arbitration proceedings. Neither the parties nor the higher regional court have a right to inspect the files of the arbitral tribunal

Exemptions from the duty of confidentiality

Facts and circumstances that have already become known are exempt from the duty of confidentiality.[30]

Special cases

In state jurisdiction, submitting an appeal usually causes the relevant court of appeal to consult the files of the respective lower court.

In German arbitration proceedings, however, there is no appellate arbitration panel. In Germany, arbitral awards can be challenged before the competent higher regional court (*Oberlandesgericht*), which decides on the reversal (§ 1059 ZPO) or the enforcement (§ 1060 (2), § 1061 ZPO) of an arbitral award. Thus, the question is: Does the higher regional court have the right to ask the arbitral tribunal to submit its files, or is the secrecy of deliberations of the arbitrators contrary to this idea?

In connection with a review, a differentiation must made between:

- the case files of the arbitral tribunal;
- the reference files of the arbitrators (they may contain internal marks); and
- any other additional documents that may be on hand.

Both the higher regional court carrying out the review and the party intend to use the inspection of the appealing files of the tribunal to find potential indications for violations of procedures.

Court files versus arbitral files

In appellate state court proceedings, there is no doubt that the parties may inspect the files available to the court of first instance. They have the right to do so after the proceedings have been initiated and until a final decision has been taken by the court of appeal. As the files in the proceedings at first instance are further kept by the appeal court, one single procedural file is on hand.

In contrast to state court proceedings, a review of the arbitration proceedings by the higher regional court does not constitute a continuation of the arbitration proceedings. Neither the parties nor the higher regional court have a right to inspect the files of the arbitral tribunal. This, of course, can trigger a broad range of issues (for example, if one of the parties holds that procedural mistakes have been committed by the arbitral tribunal).[31]

So far in Germany, no case law exists in this regard and there are only very few opinions available on this issue in literature.[32]

Obligation to secrecy on the basis of penal law?

Under the assumption that arbitrators carry out their activities not in connection with the function assigned to them under § 203 StGB (*German Criminal Code*), an obligation to secrecy under criminal law pursuant to § 203 StGB does not exist.

Therefore, arbitrators remain bound to the general obligation to secrecy established under the arbitration agreement.

When must confidentiality be relinquished?

In the light of the foregoing, the question arises whether the occurrence of offences in arbitration proceedings establishes an obligation of the arbitrators to disclose these offenses to state authorities (usually to the public prosecutor's office).

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Arbitrators as well are subject to the general obligation incorporated in the StGB to report imminent serious crimes pursuant to § 138 StGB. This provision, however, may be irrelevant in cases of alleged money laundering or cartel arrangements, or cases of corruption. Arbitrators are not *per se* obliged to report to law enforcement agencies a suspicion regarding the future commission of a crime.

It is clear that an obligation of arbitrators under public law to make a statement cannot, at the same time, be

30 Gal, Die Haftung des Schiedsrichters in der internationalen Handelsschiedsgerichtsbarkeit, 2009, p. 333 *et seq.*

31 Hilgard, BB 2014, 1929 *et seq.*

32 In detail Haller, SchiedsVZ 2011, 179; cf. also Lachmann, Handbuch für die Schiedsgerichtspraxis, 3rd Ed. 2008, margin no. 1104, and Wais, in: Schütze/Tschernig/Wais, Handbuch des Schiedsverfahrens, 2nd Ed. 1990, margin no. 294.

qualified as a violation of their duty of confidentiality. However, it is assumed that, in such a situation, arbitrators are obliged to at least make use of their right to refuse testimony to the extent possible and refer to the secrecy of deliberations.[33]

The reasonable exercise of their personal rights cannot be classified as a violation of the arbitrators' duty of confidentiality. This applies to cases where, for instance, an arbitrator files an action against both parties for the payment of the agreed arbitrator's remuneration. This does not constitute a violation of the arbitrator's duty of confidentiality.[34]

Under § 183 GVG (*German Code on Court Constitution*), a state court is obliged to report to state authorities only if crimes were committed during the hearing, not if they merely become known during the hearing.[35]

Obligations to report could initially result from the provisions of the German Money Laundering Act (*Geldwäschegesetz, GwG*). The group of persons obliged to report within the meaning of the Money Laundering Act, however, is limited and does not include arbitrators. This applies even if, just as lawyers, they are among the persons potentially having an obligation to report (§ 2 (1) no. 7 GwG).

When may confidentiality be relinquished?

It could be assumed that the termination of the mandate as an arbitrator causes the termination of the duty of confidentiality. If one followed this view, it would be easily possible for the other arbitrators, the parties, and interested third parties to fully inspect the arbitral files after the termination of the arbitral proceedings. Arbitrators, referring to their duty of confidentiality, could not refuse the inspection of the files.

Legal situation with respect to judges in state courts

Even if judges are not obliged to disclose facts of an offense, it is nonetheless generally assumed that the (voluntary) forwarding of such facts to state authorities cannot be considered a violation of the duty of confidentiality of judges.[36]

If judges are not obliged to notify state authorities of a suspicion for the purpose of solving the relevant offense or crime, such notification to law enforcement authorities may be in the judges' discretion.[37] When exercising their discretion, judges will be guided by:

- the seriousness of the crime or offense;
- the safeguarding of interests of potentially affected third parties;
- the protection of the reputation and the neutrality of the court; and
- the credibility of the administration of justice.

It is also considered that judges should notify the law enforcement agencies in "well-justified" cases and should otherwise remain on the sidelines of criminal investigations.[38]

The aforementioned criteria for state judges, however, do not apply to arbitrators. Rieder/Schönemann[39] point out that arbitrators could be facing the allegation of a promotion or concealment of corruption considerably more often than state judges, as the abuse of arbitration proceedings to obscure things is not regarded as an abstruse possibility.[40] They state that, therefore, arbitrators are subject to a substantially higher criminal liability than state judges are, in particular when an action of aiding and abetting (*Beihilfe*) is taken into account.

Even if arbitrators are not obliged to notify law enforcement authorities of criminal law facts, they may have the right to do so. However, it is generally disputable in what cases such right to notify – which at the same time implies an abandonment of the duty of confidentiality – exists.[41] Both the rejection of the right to

33 Gal, loc. cit.

34 Gal, loc. cit., p. 333.

35 Cf. Kissel/Mayer, GVG, 6th Ed. 2010, § 183 margin no. 2; Zimmermann, in: Münchener Kommentar, ZPO, 4th Ed. 2013, § 183 GVG margin no. 3, 4; Rieder/Schoenemann, NJW 2011, 1196 *et seq.*

36 Voit, in: Musielak, ZPO, 11th Ed. 2014, § 1035 margin no. 24.

37 *A contrario* reasoning from § 183 GVG, cf. BayObLG NJW 1968, 56; Kissel/Mayer, GVG, 6th Ed. 2010, § 183 margin no. 1, Nierwetberg, NJW 1996, 432, 434; Rieder/Schoenemann, NJW 2011, 1169 *et seq.*

38 Cf. Knoche, MDR 2000, 371; Nierwetberg, NJW 1996, 432, 435 and Rieder/Schoenemann, NJW 2011, 1169 *et seq.*

39 NJW 2011, 1169 *et seq.*

40 Von Schlabrendorff, in: Festschrift für Schlosser, 2005, 851; Reschke/Kessler/Berger, Recht und Praxis des Schiedsverfahren, 3rd Ed. 1999, margin no. 113 *et seq.*; Rieder/Schoenemann, NJW 2011, 1169 *et seq.*

41 Spehl, SchiedsVZ 2009, 322, 323; Rieder/Schoenemann, NJW 2011, 1169.

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notify[42] and the acceptance of such right to notify[43] are under consideration.

It is alleged, for instance, that arbitrators are not prevented from notifying the competent authorities of a suspicion of the future commission of a crime or money laundering.

Final remarks

Do arbitrators have a duty of investigation?

It is accepted for German arbitration proceedings that a "limited investigative principle" is applicable

It is accepted for German arbitration proceedings that a "limited investigative principle" is applicable. The investigative powers of arbitrators thus depend on the parties' sovereignty over the arbitration proceedings. Arbitrators may neither investigate like a criminal court or a police authority, nor on their own initiative.

Confidentiality vs. transparency

Arbitrators must ensure that the exclusion of the public from the proceedings is not abused by the parties for any other purposes than the procedural ones

Arbitration proceedings are open only to the parties, meaning that the public is left out. This way of conducting the proceedings "behind closed doors", which is regarded as an advantage by many parties, also creates an allegation of non-transparency.[44] Therefore, arbitrators must ensure that the exclusion of the public from the proceedings is not abused by the parties for any other purposes than the procedural ones.[45]

42 Rieder/Schoenemann, loc. cit.

43 Possibly the prevailing opinion.

44 This accusation was made in public in particular with respect to the institution of ICSID arbitration courts in free trade agreement with the U.S. (TTIP), and it may eventually lead to the TTIP agreement being adopted without a possibility of arbitration.

45 In stark contrast hereto, some national laws allow third parties to enter a state court proceeding pending between other parties if they have a specific interest in one side prevailing; see, for example, Hilgard, Der Amicus Curiae Brief oder: wie schön, Freunde zu haben, 2015.