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MS  *Amlin*

# Contracts under English law with German jurisdiction?



## Over the years we have seen a steady increase in offshore contracts from our Assureds in which the applicable law is different from the place of jurisdiction

In the maritime and offshore industry parties not seldomly agree on the applicability of English law although both parties do not have their business seat in the United Kingdom or are of UK nationality. The reasons for this choice are diverse. Sometimes, if the parties are of different nationalities, both parties are hesitant to accept the law of the respective other party since it is unknown – or less known – to them. They fear that the other party might gain an advantage during the contract negotiations with regards to a potential subsequent legal dispute. English law is regarded as “neutral” in such situations.

With an increase of projects in the German offshore sector, parties quite often agree on the jurisdiction of German courts. This appears reasonable in particular if the offshore site to which the contract relates is located in Germany, respectively German territorial waters. Therefore, should a dispute arise under such a contract, German courts would have to decide such dispute, but would have to apply English law.

Dr Nicoletta Kroeger and Dr Jan Backhaus, partners of CORVEL LLP, Hamburg, Germany have recently drafted a short advice on this topic which we are pleased to share with our network, especially with those working in the offshore industry.

For any queries on this topic please contact our Client Services Desk: [ClientServices@msamlin.com](mailto:ClientServices@msamlin.com)

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## 1. English Law before a German Court – does that work?

Even though contracts are often drafted in the English language, the language of the court is German according to the German Procedural Code. Consequently, usually (see for exceptions below) all submissions have to be in the German language, as well as oral hearings and taking of evidence.

Many German judges feel at least sufficiently comfortable with the English language to accept exhibits to submissions in English without translation into German. However, that depends on the judge(s) hearing the respective case. There are meanwhile some exceptions from these principle rules: some court chambers, for example in Hamburg, take part in a pilot project, which aims to allow a court proceeding to be held completely in the English language.

Since (German) judges are not educated in English law, they instruct English legal experts to clarify the legal situation as far as a legal argument with regard to English law is disputed between the parties and could be decisive for the court's decision.

To clarify such disputed arguments the court usually poses questions to a legal expert who answers these questions in a written legal opinion. If the court sees a respective need, it will further hear the expert in a hearing. This procedure is possible but results in extra costs and is more time consuming than usual proceedings in the German language.

Furthermore, the outcome is not always ideal. It happens for example that a German court believes that one and the same English expression or contract clause could or should be interpreted and/or understood differently in German proceedings compared to the interpretation in English case law. Whether this understanding of some of the courts is correct may be questioned. However, it is the reality, with which the parties have to cope.

## 2. Can German court decisions be enforced outside of Germany?

Court decisions – of German or other state courts – may have the disadvantage of not being enforceable in other states. The background is that court decisions are part of the sovereignty. Sovereignty, however, is always limited to the territory of the respective state. To exercise jurisdiction abroad, for example to enforce the judgment against assets which are based in a foreign state, the consent of the respective foreign state is required. Such consent is usually laid down in bilateral or multilateral treaties or in the national laws.

In the European Union court decisions from other member states are accepted like the decisions of their own courts. An enforcement in an EU member state is therefore possible.

This is different in non-EU states and will also become different in the UK should the UK decide to leave the European Union without a withdrawal agreement. Whether bilateral or multilateral agreements or the national law accept the enforcement of respective foreign court decisions depends on the particular state and case.

In case the UK leaves the EU without an withdrawal agreement, some experts further expect that English law may drift slightly away from the EU law as the English courts will then not be bound by the case law of the European courts anymore, in particular of the European Court of Justice.

## 3. Is there a better solution available?

The question remains whether there is a better solution. And indeed there is one by way of agreement on an arbitration clause in a respective contract, instead of agreeing on state court proceedings.

Arbitral tribunals can decide on disputes if so agreed by the parties to the dispute. One of the advantages of arbitration is that the parties, under most arbitration rules, are free to choose their arbitrators. Therefore, the parties may choose arbitrators who are able to handle the whole arbitration in the English language and are also educated in English law. The arbitration rules for example of the German Maritime Arbitration Association (GMAA) – as well as many others – allow the parties to choose an arbitrator who is trained in English law (only). Thus, it is not necessary for the parties to incur costs for translations and/or legal experts. Moreover, most of the arbitration proceedings are more efficient and less time consuming than state court proceedings.

Arbitration awards are enforced on the basis of the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards. This convention has been ratified by more than 150 states worldwide. These ratifying states have declared to accept the enforcement of foreign arbitral awards in their country. Therefore, the enforcement of arbitration awards is possible in many more states compared to state court decisions.

## 4. Conclusion

Contracts may provide for the application of English law and jurisdiction of German courts. However, there are better alternatives. If the parties want to agree on the application of English law but would like to have a dispute resolution in Germany, the contractual agreement should provide for an arbitration clause with the place of arbitration in Germany instead of a jurisdiction of state courts.

By agreeing on arbitration as the means of dispute resolution the parties can make sure that the proceeding is completely handled in the English language and that the arbitrators are familiar with English law. Arbitration awards have the additional advantage of being enforceable in more states than court decisions can be enforced in.

For more information on arbitration clauses and the handling of arbitration proceedings please feel free to contact Dr Nicoletta Kroeger or Dr Jan Backhaus, partners of CORVEL LLP, Hamburg, Germany.