



## India Desk Newsletter

The purpose of this newsletter is to highlight the key legal developments and business trends in Germany and other parts of Europe in Q1/Q2 2024.

We have also included a few matters which we have advised on.

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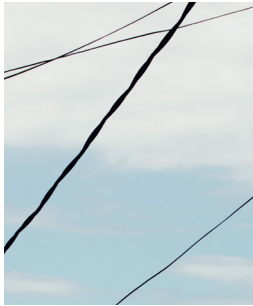
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### I. Advanced technologies for Efficient Mass Litigation

The phenomenon of mass litigation is here to stay. From its predominance in securities and antitrust litigation, mass claims have rapidly expanded into the retail and consumer areas and we expect the trend to sustain given the relatively low cost of litigating in Germany, and the courts taking a generous stance when faced with matters such as data protection claims.

Companies and their legal advisors dealing with claims *en masse* face numerous challenges both at strategic and operational level. Strategic claims need to be identified and prioritized. The sheer mass of claims needs to be handled efficiently. In our view, the most important risk for both in-house and external teams is losing sight of the strategic goals (achieving the best overall result for the company) for all the organizational requirements, i.e., keeping legal teams' attention and their time free for actual legal work, and minimizing the time required for organizational tasks as far as possible. This is where technology can help.

Hengeler Mueller has been at the forefront of defending mass litigation claims in Germany and beyond. Underpinning this success is our mass litigation platform – designed to streamline and digitize the entire litigation process, with features such as AI-based automated extraction of key information, automated task allocation, and semi-automated drafting of legal documents. The platform features a nuanced permission system that obviates the need to maintain parallel data pools, allowing greater efficiency in each stage of the process and for all clients to have complete visibility and access to all court files, deadlines and hearing schedules at any time. For proceedings that require the involvement of other service providers (e.g. proceedings involving multiple jurisdictions), the platform facilitates managing numerous law firms or external service providers within our litigation network. Perhaps most importantly, the mass litigation platform is operated by our dedicated HM Legal Tech Center team that can adapt the platform and all workflows according to the specific requirements of every mass claim scenario.



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## II. Corporate Sustainability Due Diligence Directive adopted by the European Parliament

In our previous newsletter, we examined the status and scope of the draft Corporate Sustainability Due Diligence Directive (CSDDD or CS3D). In what was the final step in the EU legislative decision-making process, the Council of the EU officially adopted the CSDDD on 24 May 2024. The step marks a new age of corporate accountability for adverse environmental and human rights impacts within the EU.

Following the publication of the law in the Official Journal of the EU on 5 July 2024, the EU Member States have two years (until 26 July 2026) to transpose the law into national law. However, the rules will apply on a phased basis as follows:

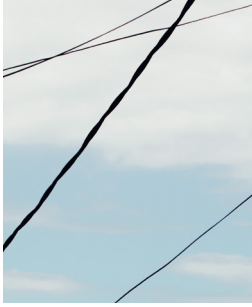
- 3 years after entry into force (c. 2027), CSDDD will apply to EU companies with over 5,000 employees and an annual turnover greater than EUR 1.5 billion and to non-EU companies with the same annual turnover in the EU.
- 4 years after entry into force (c. 2028), CSDDD will apply to EU companies with more than 3,000 employees and an annual turnover greater than EUR 900 million and to non-EU companies exceeding this turnover in the EU.
- 5 years after entry into force (c. 2029), CSDDD will apply to all EU companies with over 1,000 employees and a worldwide net turnover exceeding EUR 450 million and to non-EU companies with this turnover in the EU.

The CSDDD sets out obligations for companies and their upstream and downstream partners to prevent, mitigate and remedy negative impacts of their activities on human rights and the environment. Specifically, the CSDDD introduces an obligation to adopt a transition plan to mitigate climate change, intended to ensure that the business model and strategy of companies are compatible with the goal of limiting global warming to 1.5 °C.

Companies subject to the CSDDD should plan for the necessary adjustments of their policies and procedures rather sooner than later. As India is a major player in the EU economy, Indian companies with subsidiaries or significant activities in the EU will have to comply with these directives and should begin to review their ESG practices. Companies that effectively implement these due diligence measures can position themselves as leaders in sustainability, potentially attracting more ESG-savvy investors and customers.

## III. Important Steps towards the Modernisation of Arbitration Law in Germany

On 26 June 2024, the Federal Government presented a draft bill on the modernization of arbitration law. The bill aims to improve the efficiency of arbitral proceedings conducted in Germany and strengthen Germany's position as an international arbitration venue. The draft bill must still undergo the legislative process but is likely to be adopted by the German Parliament (*Bundestag*) without significant amendments. Below, we have highlighted those proposed changes to German arbitration law which we consider to be the most practically relevant. For a detailed evaluation of the draft bill, please see our recent Newsletter [\(Important Steps towards the Modernisation of Arbitration Law in Germany | Hengeler Mueller News\)](#).



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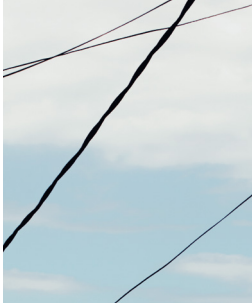
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- **Informal arbitration agreement** – Under the bill, arbitration agreements may be concluded verbally or by the parties' conduct, provided that neither party is a consumer. Eliminating form requirements for arbitration agreements between commercial parties has practical advantages, in particular in connection with global supply and framework agreements. However, it may impair the enforceability of such agreements as Article II (1) of the New York Convention requires a written arbitration agreement. Parties are therefore advised to continue drawing up their arbitration agreement in writing.
- **Video hearings and electronic awards** – Arbitral tribunals seated in Germany will have the authority to conduct video hearings unless the parties have agreed otherwise. The bill also authorizes arbitral tribunals to issue the award electronically, provided that the names of the arbitrators and their qualified electronic signatures are included in the electronic document.
- **English as the procedural language** – Proceedings in arbitration matters may in the future be conducted before so-called Commercial Courts, which the federal states (*Bundesländer*) may establish as new divisions of the Higher Regional Courts. Before these courts or if the parties so agree, the proceedings may be conducted entirely in English. In appeal proceedings, however, the German Federal Court of Justice (*Bundesgerichtshof*) can order at any time, without giving reasons, that the proceedings be continued in German or that parts of the case file be translated into German.
- **Dissenting opinions and publication of arbitral awards** – The draft bill allows arbitrators to issue separate (dissenting) opinion, thereby creating legal certainty in Germany for a widely accepted feature of international arbitration proceedings. Furthermore, the draft bill permits the publication of arbitral awards with the consent of the parties. Whether choosing institutional arbitration rules would reliably protect parties from the publication of the award depends on the specific rules. Some institutional arbitration rules or the practical guidelines for their application (for example those provided by the International Chamber of Commerce), require parties to expressly object. Accordingly, legal practitioners are well-advised to consider including a confidentiality provision in the arbitration agreement.
- **Appointment of arbitrators in multi-party arbitration proceedings** – The draft bill introduces provisions for the constitution of the arbitral tribunal in multi-party proceedings, thereby closing a regulatory gap of practical importance for *ad hoc* arbitrations. Mirroring the provisions already included in many institutional arbitration rules, the draft bill provides that a co-arbitrator must be jointly appointed by all parties on the same side. If they fail to jointly appoint an arbitrator, the competent court will have the power to either appoint the arbitrator for the joined parties only or to also appoint the arbitrator for the opposing party.
- **Provisional or protective measures** – The draft bill authorizes German courts to enforce in Germany provisional or protective measures ordered by an arbitral tribunal with a foreign place of arbitration. Under the amended law, a state court will only be able to reject enforcement applications for a limited number of reasons, which include the grounds that can lead to the annulment of an arbitral award, failure to provide a security for costs ordered by the arbitral tribunal, or that a corresponding interim measure has already been applied for before a domestic state court.



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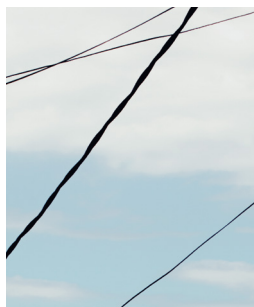
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Overall, the proposal is a welcome initiative to modernize the German arbitration law. The draft bill contains many useful and positive clarifications and innovations and is an important step towards improving Germany's position in the market for international arbitration.

## IV. The AI (r)evolution on German supervisory boards

In Germany, supervisory boards play a vital role in examining boards' decisions and offering forward-looking advice based on a host of information. In doing so, the use of artificial intelligence may come in handy but not without recognizing the risks and challenges that arise from it:

- With one click – Supervisory boards dealing with extensive documentation might be tempted to use generative AI to summarize and convert presentations into bullet-point lists; however, constraints around token limits, i.e., number of data points that model can process at once, might hinder the efficacy of the results, making its applications often limited to smaller work steps or requiring multiple AI solutions to complete the task.
- Warning: hallucinations – When generative AI does not know the context of a task or have sufficient real-world data, it generates new information that is factually incorrect but that often seems credible. Moreover, deep learning methods, i.e., AI's use of neural networks to detect patterns efficiently, create a 'black box' situation, posing further challenges in predicting or understanding the performance of AI systems.
- The black box boundary – Let's say a company utilizes AI technology, trained on historical lending data, to predict credit risk. However, the way the AI assesses this risk is not easily understood, posing a challenge for supervisory boards and raises questions about the conditions needed to invoke the German business judgment rule (BJR) for protection. If the output of AI decision-making is not verifiable, both executive and supervisory boards may struggle to invoke the BJR defense, particularly in the finance sector where compliance with laws is vital. While verifiability is essential, completely abstaining from using AI may also be a mistake.
- The consultation duty? – In the future, arguments may arise claiming that it is necessary to consult AI tools, even without legal changes. Therefore, it is important to develop automated decision-making governance to assess the benefits and constraints of AI's use by supervisory board members. While supervisory board members need not grasp the complexities of AI, they must understand how raw data is chosen and steer its selection for training and usage. Additionally, they should be aware of their AI's capabilities and limitations and utilize competent prompts.
- Final control - Lastly, supervisory boards, like executive boards, must assess the importance of AI's output compared to other sources of information to minimize risk and fulfill their obligations. Ultimately no AI will be able to relieve supervisory boards of their duty to ensure this final control.



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## V. ESG Study: Companies & ESG – Transformation or just reporting?

As part of the Green Deal, the European Union has decided to propel the sustainable transformation of its Member States forward and to make Europe the first climate-neutral continent by 2050. The aim of the EU's sustainable finance framework is to channel private investment into transitioning the bloc's economy to a resource-efficient and climate-resilient one.

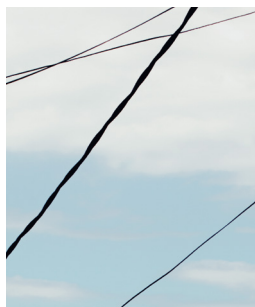
Our latest study 'Companies & ESG – Transformation or just reporting?', which we published jointly with Deutsches Aktieninstitut, provides an insight into the challenges faced by listed companies when implementing the new requirements. It builds on our previous joint study 'Companies in the Transformation Process' and looks at the implementation and evaluation of regulation in addition to questions on fundamental attitudes, motivation and the transformation process.

[Learn more.](#)

## VI. Recent matters

Hengeler Mueller advised:

- Austrian bank **BAWAG** Group on acquisition of Barclays' German retail banking business.
- **Deutsche Bank** on issuance of Tier 1 capital instruments with a principal amount of EUR 1.5 billion.
- **Siemens AG** on the sale of Innomotics, a world leading electric motors and large drives company worth EUR 3.5 billion to KPS Capital Partners.
- **KKR** on the combination of its portfolio companies, Mediawan and LEONINE Studios, in an all-stock transaction.
- **Knorr-Bremse AG** on the acquisition of Alstom's rail signalling technology business in North America worth EUR 630 million.
- **Porsche SE** on record bond issuance of EUR 1.6 billion.
- **Douglas AG**, German multinational perfumery and cosmetics chain, on its EUR 890 million IPO.
- **KKR** on launch of voluntary take-over offer for Encavis AG, a leading and proven German renewable energy platform and independent power producer.
- **EQT** on the sale of its 20% stake in Ottobock, the global leader in wearable human bionics solutions.
- **Blackstone** on the sale of a German-Dutch logistics portfolio to Clarion Partners Europe.
- **Software AG** on the sale of webMethods and StreamSets businesses to IBM.
- **Waterland Private Equity** on the sale of Exercite to TA Associates and Warburg Pincus.
- **Siemens Healthineers GmbH** on transfer of major part of its assets to Siemens Healthineers AG.



## About the firm's India Desk

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The India Desk advises Indian companies on their business activities in Germany and throughout Europe and in accompanying German companies to India. Members of the India Desk regularly visit India to meet corporates, law firms, banks and auditors and also to attend conferences based on different topics like IT and foreign investment in India.

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