CLYDE&CO

Arbitration & Litigation

Quarterly Update 4/2021 Germany

Contents

Liebe Leserin, lieber Leser,

wir nähern uns Weihnachten und damit auch dem Ende des Jahres 2021. Die Herausforderungen der Corona-Pandemie sind zu unserem Alltag geworden – das zeigt sich auch im Rahmen der Streitbeilegung. Der Einsatz digitaler Medien, zum Beispiel zur Umsetzung von Virtual Hearings, hat sich mittlerweile fest etabliert. So fanden auch 2021 die meisten Arbitration-Veranstaltungen virtuell statt – gegen Ende des Jahres ist jedoch ein Trend hin zu hybriden Veranstaltungen zu beobachten. Während diese Entwicklung auf eine weiter fortschreitende Normalisierung der aktuellen Lage hindeutet, werden uns viele der digitalen Elemente in der Streitbeilegung auch in Zukunft erhalten bleiben. In dieser neuen Ära sind datenschutzrechtliche Themen aktueller als je zuvor und werfen zahlreiche Fragen mit erheblicher praktischer Relevanz auf. Dies war zum Beispiel bei dem jüngsten Gerichtsurteil Lloyd vs. Google der Fall, in dem der britische High Court of Justice eine Sammelklage gegen Google wegen der unerlaubten Sammlung von persönlichen Daten von iPhone-Nutzern abgewiesen hat. Wir blicken gespannt auf das Jahr 2022 und die Entwicklungen in der (Schieds) Gerichtsbarkeit, die es mit sich bringen wird.

Zum Abschluss dieses Jahres haben wir Ihnen eine Reihe interessanter Artikel zusammengestellt. In der aktuellen Ausgabe unseres Quarterly Updates geht es um die folgenden aktuellen Themen:

- Nadia Darwazeh im Porträt
- GDPR damage claims – a potential for mass litigation in Germany?
- Lloyd v Google: Supreme Court unanimously rules in favour of Google
- Investor-state arbitration and climate change: a plate-spinning act?
- BGH: Absenken der Substantiierungspflicht in einem medizinischen Produkthaftungsstreit
- Bindungswirkung einer gerichtlichen Entscheidung über die Zuständigkeit des Schiedsgerichts
- A fundamental error in a Qatar arbitration, and a lesson that is relevant to any arbitration
- Dubai reforms its arbitration centres, with immediate effect

Zum Schluss bleibt es uns Ihnen eine interessante Lektüre, schöne Weihnachtsfeiertage und einen guten Start in das neue Jahr zu wünschen. Wir freuen uns darauf, Ihnen auch 2022 die relevantesten Entwicklungen im Bereich der Streitbeilegung in unserem Quarterly Update zur Verfügung zu stellen.

Wie immer freuen wir uns über Fragen, Anregungen und Feedback. Schreiben Sie uns gerne dazu an **arbitration.germany@clydeco.com**.

Ihr Clyde & Co Arbitration Team Germany

Dear readers

We are approaching Christmas and with it the end of 2021. The challenges of the Corona Pandemic have become part of our everyday life – this is also evident in the context of dispute resolution. The use of digital media, for example to implement virtual hearings, is now an established practice. Thus, in 2021, most arbitration events again took place virtually. Towards the end of the year, however, a trend to hybrid events can be observed. While this development points to a further normalisation of the current situation, many of the digital elements in dispute resolution will remain with us in the future. In this new era, data protection issues are more relevant today than ever, raising numerous questions with significant practical significance. This was the case, for example, with the recent court decision Lloyd vs. Google, in which the High Court of Justice in UK dismissed a class action lawsuit against Google for the unauthorized collection of iPhone users' personal data. We look forward to 2022 and the developments in litigation and arbitration that it will bring.

To conclude this year, we have compiled several interesting articles for you. The current issue of our Quarterly Update focuses on the following topics:

- Nadia Darwazeh im Porträt
- GDPR damage claims – a potential for mass litigation in Germany?
- Lloyd v Google: Supreme Court unanimously rules in favour of Google
- Investor-state arbitration and climate change: a plate-spinning act?
- BGH: Absenken der Substantiierungspflicht in einem medizinischen Produkthaftungsstreit
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- Dubai reforms its arbitration centres, with immediate effect

We wish you an interesting read, happy holidays and a good start into the new year. We look forward to providing you with the most relevant developments in the field of dispute resolution in our upcoming Quarterly Updates in 2022.

We hope you enjoy reading. Please feel free to contact us at **arbitration.germany@clydeco.com** with your questions, suggestions and feedback.

Sincerely yours

Clyde & Co Arbitration Team Germany

Unser Team / Our Team

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Nadia Darwazeh im Porträt

Unsere Partnerin Nadia Darwazeh wurde für das Projekt breaking.through interviewt. Dabei geht es um Themen wie die fachliche Orientierung, die Vorteile aus der Komfortzone auszubrechen und darum, wie man "unconscious bias" entgegentreten kann.

breaking.through hat es sich zur Aufgabe gemacht, **erfolgreiche Juristinnen zu porträtieren und durch wöchentlich erscheinende Interviews noch sichtbarer zu machen. Ausschlaggebend für** die Gründung von breaking.through war die Erkenntnis, dass das Fehlen von Vorbildern häufig dazu führt, dass junge Juristinnen entsprechende Berufsbilder von vornherein in der eigenen Karriereplanung ausschließen. Wenn diese in Kanzleien in der Führungsebene keine Partnerin antreffen, fällt es ihnen viel schwerer, sich vorzustellen, dass sie selbst einmal als Partnerin arbeiten könnten. Unter den über 200 porträtierten Frauen bei breaking.through befinden sich erfolgreiche Juristinnen auf nationaler und internationaler Ebene. Vorgestellt werden Professorinnen, Partnerinnen aus Kanzleien, Richterinnen sowie Juristinnen aus Politik und Wirtschaft. Eins fällt beim Durchlesen der diversen Interviews auf: Die Frauen sind alle ihren eigenen Weg gegangen und geben wertvolle Einblicke in berufliche, aber auch private Erfahrungen auf diesem Weg.

Über die Porträts hinaus bietet breaking.through regelmäßig Paneldiskussionen, Workshops und eine Ratvermittlung an.
Mehr Informationen unter www.breakingthrough.de und www.breakingthrough.ch.

Wir, bei Clyde & Co, halten das Projekt breaking.though für eine hervorragende und unterstützungswürdige Initiative und freuen uns auf zukünftige Gelegenheiten einer Zusammenarbeit.

Das Interview von Frau Nadia Darwazeh führte Frau Hülya Erbil.

Frau Darwazeh, Sie sind Head of Arbitration bei Clyde & Co LLP in Paris. Schon zu Beginn Ihres Arbeitslebens waren Sie in diesem Rechtsgebiet tätig. Für wie wichtig halten Sie es, sich fachlich früh festzulegen?

Das kommt ganz darauf an: Gerade für Berufsanfänger kann es besonders interessant sein in einer allgemeineren Praxis anzufangen, um erstmal Erfahrungen auf verschiedenen Gebieten zu sammeln. Auf diesem Weg kann man am Anfang der Karriere herausfinden, was einen wirklich interessiert. Ich selbst habe den Weg gewählt, mich von Anfang an auf den Bereich „International Arbitration" zu spezialisieren. Ich habe den Bereich relativ früh, nämlich während einer meiner Stationen als Trainee Solicitor in London, kennen und lieben gelernt.

Aber auch wenn man sich am Anfang der Karriere erstmal breiter aufstellt, halte ich es für die zukünftige berufliche Entwicklung für sinnvoll sich zu spezialisieren. Denn durch die aktuellen Trends – wie Legal Tech – ist eine Spezialisierung umso wichtiger, um wirklich einen unersetzbaren Mehrwert anbieten zu können.

> Mit Leidenschaft und Ehrgeiz schafft man vermeintlich Unerreichbare.

Sie haben sich nach einigen Jahren als Anwältin in einer Wirtschaftskanzlei in Frankfurt dazu entschieden, den Ihnen dort aufgezeigten Weg in die Partnerschaft gegen eine Tätigkeit in Shanghai mit unsicherer Perspektive einzutauschen. Wieso?

Nachdem ich etwa vier Jahre lang in Frankfurt in meinem Bereich in einem großartigen Team gearbeitet habe, hatte ich das Gefühl, bereits viele Facetten meines Berufes kennengelernt zu haben. Klar, wäre es einfacher für mich gewesen direkt in Frankfurt die Partnerschaft anzustreben. Aber ich war und bin schon immer ein sehr neugieriger Mensch gewesen, trete gerne aus meiner Komfortzone aus, entwickle mich weiter und liebe es andere Kulturen kennenzulernen. Es war damals sicherlich keine einfache Entscheidung Frankfurt zu verlassen, um nach Shanghai zu ziehen, aber ich wollte unbedingt meinem Wunsch nachgehen und Arbitration in Asien praktizieren. Ich bin eine große Verfechterin des Mottos „Dream it – Do it". Schließlich ist doch das Schlimmste was einem passieren kann, wenn etwas nicht klappt, dass man zurückkommt und um ein paar Erfahrungen reicher ist. Durch vorherige Reisen in China wusste ich auch, dass ich Teil der unglaublichen Dynamik vor Ort sein wollte und dass in China arbeiten im Jahre 2004 ein einmaliges Abenteuer sein würde.

Nachdem Sie erkannt haben, dass in Shanghai zu dieser Zeit noch kein wirkliches Schiedsverfahrensrecht etabliert war, haben Sie sich nicht nach einem anderen Rechtsgebiet umgeschaut, sondern an Ihrer Leidenschaft für Arbitration festgehalten – mit Erfolg! Was raten Sie jungen Juristinnen und Juristen, wenn es um die fachliche Flexibilität geht?

Es ist natürlich von Vorteil, wenn man in fachlicher Hinsicht flexibel ist, dann hat man mehr Optionen. Für mich ist allerdings das A und O, dass man in einem Rechtsgebiet tätig ist, das einem richtigen Spaß macht, denn nur so wird man in dem was man tut richtig gut.

Wenn man „sein" Rechtsgebiet gefunden hat, dann ist man auch bereit einige Hürden zu überwinden und stetig am Ball zu bleiben. In meinem Fall war 2004 der „International Arbitration" Markt in China quasi nicht existent. Wirkliche Spezialisten auf diesem Gebiet konnte man an einer Hand abzählen. Am Anfang war es sehr frustrierend, so viele Absagen von Kanzleien zu bekommen, die mir sagten sie wären nicht daran interessiert den Bereich Arbitration aufzubauen. Stattdessen schlug man mir vor doch auf Unternehmensrecht umzusatteln. Ich habe aber nicht lockergelassen und an meinem Traum festgehalten Arbitration in China zu praktizieren. In der Zwischenzeit habe ich Chinesisch gelernt – und dann hat es eben doch funktioniert. Wie man so schön sagt: wo ein Wille ist, ist auch ein Weg. Letztendlich konnte ich eine amerikanische Kanzlei vom Entwicklungspotenzial des Bereichs „International Arbitration" überzeugen und habe dort sehr spannende und lehrreiche Jahre erlebt. Daher rate ich jungen Juristinnen und Juristen dazu, verschiedene fachliche Orientierungen auszuprobieren, um herauszufinden welche einem am meisten Spaß macht und diese dann auch weiterzuverfolgen.

Hatten Sie auch Momente in Ihrer beruflichen Laufbahn, die Sie als besonders herausfordernd empfunden haben? Falls ja, was haben Sie aus dieser Situation gelernt?

Mir sind zwei Situationen in meiner beruflichen Laufbahn besonders in Erinnerung geblieben: Als ich meine Karriere in Frankfurt als first-year Associate gerade angefangen habe, hatte kurz vorher der Senior Associate gekündigt. Außer mir gab es in dem Team keine anderen Associates, die an den Fällen arbeiten konnten. Somit hat der Partner mir von Anfang an sehr viel Verantwortung übertragen. Ich hatte noch keine wirkliche Erfahrung und daher sehr viel Druck, weil ich viele Aufgaben gleichzeitig meistern musste. Oft habe ich 16 Stunden am Tag gearbeitet. So habe ich mir öfter die Frage gestellt "Schaffe ich das? Kann ich das?". Als Motivation habe ich mir immer gesagt, dass der Partner mir nicht diese Verantwortung anvertrauen würde, wenn er nicht daran glauben würde, dass ich die Aufgaben gut meistern werde. So habe ich die Herausforderungen ins Positive gedreht und sie als Chance verstanden und durfte beispielsweise schon nach einem Jahr mehrere Zeugen im Rahmen von Depositions in New York vernehmen oder vor einem Schiedsgericht in Nepal ein Kreuzverhör durchführen.

Ich erinnere mich noch, dass mir vor dem Kreuzverhör vor Aufregung so schlecht war, dass ich nicht frühstücken konnte. Aber was für eine tolle Chance als 26-jährige ein Kreuzverhör in Nepal durchzuführen! Ich habe in dieser Anfangsphase meiner Karriere sowohl fachlich als auch persönlich unglaublich viel gelernt – das wäre nicht möglich gewesen, wenn ich nicht ins kalte (eiskalte!) Wasser gesprungen wäre. Es war eine sehr herausfordernde und tolle Zeit. Es ist wichtig in solchen Situationen immer an sich zu glauben und Selbstvertrauen zu haben. Als Tipp kann ich nur weitergeben, dass man Rat bei Leuten aus dem beruflichen, aber auch aus dem privaten Umfeld einholen sollte, die einem Mut zusprechen und einen motivieren. Mit der richtigen Portion an Leidenschaft, Ehrgeiz und Durchhaltevermögen schafft man Dinge, von denen man zunächst dachte, dass sie unerreichbar wären.

Die zweite Situation, die ich als besonders herausfordernd empfunden habe, war in der Anfangszeit meines Berufslebens in China. Ich war damals auf vielen Konferenzen, auf denen fast nur Chinesisch gesprochen wurde. Ich hatte zwar in meinem ersten Jahr intensiv Chinesisch gelernt, aber es war sehr frustrierend nur etwa 30-50% des Gesprochenen zu verstehen. Auch in meiner täglichen Arbeit hatte ich mit chinesischer Mandantschaft und chinesischen Dokumenten in Schiedsverfahren zu tun. Es war nicht immer leicht die sprachlichen und auch kulturellen Barrieren zu überwinden. Das war für mich, die ich doch sehr multikulturell aufgewachsen bin, in diesem Ausmaß nochmal eine ganz neue Erfahrung. Aus dieser Zeit habe ich für mich mitgenommen, immer das Beste aus jeder Situation zu machen. Ich habe Mechanismen gefunden, die mir sehr geholfen haben: So habe ich mit sehr kompetenten chinesischen Associates zusammengearbeitet, die mich nicht nur sprachlich unterstützt haben, sondern mir auch die kulturelle Dimension mancher Problematik aufgezeigt haben. Mein Chinesisch hat sich im Laufe der Zeit auch nochmal erheblich verbessert, sodass ich immer mehr verstehen konnte.

Beide Momentaufnahmen zeigen, dass man herausfordernde Situationen als Chance begreifen sollte, in denen man mit der nötigen Unterstützung und viel Arbeit Wunderbares lernen kann.

Neben Ihrer anwaltlichen Tätigkeit haben Sie als eine der Hauptakteurinnen das Jerusalem Arbitration Centre (JAC) zur Beilegung von palästinensisch-israelischen Geschäftsstreitigkeiten ins Leben gerufen. Inwieweit können handelsrechtliche Institutionen zur Lösung von politischen Konflikten beitragen?

Handelsrechtliche Schiedsgerichtsinstitutionen können eine wichtige Rolle bei der Lösung von politischen Konflikten spielen. Warum? Weil sie ein neutrales Forum für Parteien bieten, um Streitigkeiten zu lösen. Wenn Parteien wissen, dass es ein zuverlässiges und neutrales Forum zur Konfliktlösung gibt, ist ihre Bereitschaft diese Konflikte beizulegen umso höher. Genau das war der Grund, warum Israelis und Palästinenser 2009 die ICC, bei der ich zu der Zeit tätig war, gebeten haben bei der Gründung des JACs federführend mitzuwirken. Ein tolles und bedeutungsvolles Projekt. Beim Lunch in Jerusalem tauchte dann plötzlich Tony Blair auf und schüttelte mir die Hand, um uns zum JAC gratulieren. Die Mitarbeit an der Gründung des JAC war eine unvergessliche Zeit.

Sie nutzen LinkedIn aktiv als Karriereplattform. Was kann man durch LinkedIn erreichen?

LinkedIn ist eine gute Plattform, auf der man eigene Ideen – nicht nur beschränkt auf den juristischen Bereich – verbreiten kann. Ich setze mich beispielsweise bei LinkedIn sehr für das Thema „Gender Diversity“ ein. Ich bin immer wieder beeindruckt, wie viele Leute man über LinkedIn erreichen kann – einige Posts werden 10.000 bis 20.000 Mal angeschaut. Das ist doch unglaublich! Nicht zuletzt wird hier deutlich, welche Kraft von Sozialen Medien ausgehen kann. In Präsenzform würde man so viele Leute nicht erreichen können. Diese Reichweite kann man gezielt nutzen, um Kontakte zu knüpfen und sich mit anderen Personen im internationalen Rahmen auszutauschen.

In einem Beitrag auf LinkedIn schilderten Sie eine Situation, in der Ihnen Ihre eigenen unconscious bias bewusstwurden: Als Sie im Flugzeug die Stimme der Pilotin hörten, gingen Sie unwillkürlich erst mal davon aus, dass die Stimme einer Stewardess zuzuordnen wäre. Wie können wir solche Situationen vermeiden?

Der erste Schritt ist sich bewusst zu werden, dass jeder Mensch einen „unconscious bias“ hat. Es ist eine Fehlvorstellung, wenn man glaubt, völlig frei davon zu sein. Daher ist es umso wichtiger, seine eigenen Reaktionen und Gedankengänge immer wieder zu hinterfragen, um ein Bewusstsein für den eigenen „unconscious bias“ zu schaffen. Ein zweiter wichtiger Schritt ist dann darauf zu achten, dass man gender-neutrale Sprache benutzt. Denn Sprache schafft Bilder im Kopf, die Frauen letztendlich Möglichkeiten verschließt oder erschwert. Wenn ich immer nur vom „Schiedsrichter“ im Maskulinum rede, bildet sich im Kopf der Menschen die Idee, dass es sich nur um einen Mann handeln kann. Die Frau ist automatisch im Nachteil. Zuletzt halte ich es für sehr wichtig, für Kinder Vorbilder zu schaffen, und zwar in allen Berufen und Lebenslagen. Wenn es keine Flugzeugpilotinnen gibt, wissen Mädchen und Jungs nicht, dass Frauen auch Flugzeuge fliegen können. Vor kurzem habe ich einen interessanten Artikel über die Bedeutung von Vorbildern gelesen – es gibt heutzutage Kinder in Deutschland, die ihren Eltern fragen, ob Männer auch Bundeskanzler werden können, weil sie bisher nur Angela Merkel als Bundeskanzlerin erlebt haben! Dieses Beispiel spricht Bände über die Bedeutung von Vorbildern.

Unconscious bias haben ausweislich der meisten Forschungsergebnisse Männer und Frauen gleichermaßen. Männer entscheiden allerdings bis dato deutlich häufiger über den erfolgreichen Verlauf einer Karriere. Können an Frauen gerichtete Programme oder Initiativen damit überhaupt den gewünschten Erfolg herbeiführen oder sind sie zum Scheitern verurteilt, solange wir nicht mit „old boys club“-Mentalität oder unconscious bias aufhören?

Ich halte Frauenförderungsprogramme für sehr wichtig – genau vor dem Hintergrund, dass viele wichtige Entscheidungen nach wie vor deutlich häufiger von Männern getroffen werden. Daher ist es wichtig für Frauen genau zu verstehen, wie sie solche Entscheidungen am besten beeinflussen können. Die Situation hat sich aus meiner Perspektive in den letzten 20 Jahren zwar um einiges verbessert, aber es gibt noch sehr viel zu tun. Mädchen werden aus meiner Sicht heute immer noch zum Teil anders erzogen als Jungs, was sich auch später im beruflichen Umfeld zeigt. Meine Erfahrung zeigt, dass viele Frauen sich nach wie vor nicht trauen nach einer Beförderung oder nach einer Gehaltserhöhung zu fragen. Und das hat, aus meiner Sicht, viel mit Erziehung zu tun.

Gleichzeitig glaube ich nicht, dass Frauenförderungsprogramme allein die Lösung zu diesem Problem sind. Sehr wichtig ist auch, dass „unconscious bias“ auf Management Level aufgedeckt und ausgeräumt wird. Ich setze mich in meiner Kanzlei beispielsweise bei der Partnerwahl sehr dafür ein, dass bei der Bewertung der Leistung und Führungskraft der jeweiligen Person „unconscious bias“ offen angesprochen und in der Beurteilung berücksichtigt wird. Beispielsweise werden Frauen, die ehrgeizig sind, in Unternehmen öfter als “bossy” oder zu aggressiv abgetan, während dieselbe Eigenschaft bei Männern als positiv bewertet wird: der Mann wird als erfolgs- und zielorientiert empfunden. Frauen reden oftmals auch weniger als Männer über ihre Erfolge und werden daher zum Teil auch als weniger erfolgreich wahrgenommen. Um diesem entgegenzuwirken setzen wir uns bei Clyde & Co auf Management Level sehr dafür ein, dass „unconscious bias“ aufgedeckt und bei der Partnerwahl so gut wie möglich minimisiert wird.

Sie haben u.a. in Großbritannien, China, Frankreich und Deutschland gearbeitet. Konnten Sie Unterschiede bei der Karriereentwicklung von Juristinnen erkennen? Falls ja, welche?

Die größten Unterschiede hinsichtlich der Arbeitskultur habe ich in China beobachtet. Ich war sehr beeindruckt, wie hart die Leute dort arbeiten, wie wissbegierig sie sind und welche Dynamiken sich dort abspielen. Besonders die Verhandlungskultur in China finde ich sehr spannend. Es hat eine Weile gedauert, bis ich die Verhandlungskultur besser verstanden habe – das lag nicht nur an den anfänglichen sprachlichen Barrieren. Die unterschiedlichen Denkweisen und Verhandlungstechniken in China fand ich sehr bereichernd.

Sie haben immer Vollzeit, auch als Mutter von drei Kindern sowohl in Deutschland, China als auch in Frankreich gearbeitet. Wie wurde das in den unterschiedlichen Ländern wahrgenommen?

Die Unterschiede zwischen der Wahrnehmung einer Vollzeit arbeitenden Mutter in Deutschland auf der einen Seite, und Frankreich und China auf der anderen ist aus meiner Sicht gravierend. Als ich 2004 mit meiner ersten Tochter in Frankfurt schwanger war, wurde mir im Kanzlei- als auch im Privatumfeld gesagt, dass ich dann ja wahrscheinlich aufhören würde zu arbeiten, erstmal mehrere Jahre aussetzen und dann in Teilzeit wieder anfangen würde. Gleichzeitig habe ich einen großen sozialen Druck empfunden nicht zu arbeiten und sich erstmal ausschließlich auf die Kindererziehung zu konzentrieren. Es ist schon bezeichnend, dass es nur in der deutschen Sprache einen Ausdruck hierfür gibt – den einer Rabenmutter. Wenn eine Mutter aufhören möchte zu arbeiten, so sollte sie das tun können, aber nicht aufgrund sozialen Drucks. In China habe ich es dann als eine große Erleichterung wahrgenommen, dass es einfach “normal” war auch als Mutter zu arbeiten. Dort musste ich mich nicht rechtfertigen, dass ich Vollzeit arbeite. Auch der Wechsel von China nach Frankreich war reibungslos, da es auch in Frankreich sehr üblich ist, dass Mütter und Vater gleichermaßen arbeiten. Natürlich hat sich in der Zwischenzeit die Situation für arbeitende Mütter auch in Deutschland verbessert.

Wie haben Sie die besondere Herausforderung gemeistert, den Arbeits- und Familienalltag unter einen Hut zu bekommen?

Ich habe den großen Vorteil von Natur aus sehr viel Energie zu haben. Außerdem war ich schon immer sehr gut organisiert. Aber ich hatte auch, gerade als alleinerziehende Mutter, das Glück Hilfe aus meinem Umfeld zu erhalten. Wenn ich zum Beispiel ein 5-tägiges Hearing hatte, flog oftmals eine der Großmütter aus Hamburg ein, um die Stellung zu halten. Und ich habe diese Hilfe immer dankend angenommen. Auch hatte ich das Privileg, für die Hausarbeit viel externe Hilfe zu bekommen, um mich voll auf meine Kinder zu konzentrieren, wenn ich nach Hause kam. Ich habe auch gelernt mal alle Fünfe gerade sein zu lassen und akzeptiert, dass nicht immer alles perfekt sein muss. Letztendlich ist es nicht einfach einen anspruchsvollen Job und ein Familienleben unter einen Hut zu bekommen – aber wenn man (Frau?!) es schafft (natürlich mit allen Höhen und Tiefen), dann fühlt man sich „on top of the world“!

Gibt es Ihrer Ansicht nach einen Zeitpunkt, der sich für Eltern, die eine Karriere in einer Großkanzlei anstreben, besonders gut eignet, um Kinder zu bekommen?

Einen perfekten Zeitpunkt gibt es hierfür nicht. Ich denke trotzdem, dass es sicherlich von Vorteil ist, zunächst eine gewisse Expertise und Reputation innerhalb der Kanzlei, aber auch bei der Mandantschaft aufzubauen. Dann hat man auch für sich selbst eine gewisse Orientierung, wo die Reise beruflich hingeht, bevor man Kinder bekommt. Insbesondere vor dem Hintergrund, dass in Deutschland eine Elternzeit von ein bis zwei Jahren üblicherweise in Anspruch genommen wird, ist es sicherlich schwierig als Berufsanfänger nach so einem Zeitraum im Beruf so richtig durchzustarten. In Frankreich ist es üblich, dass Mütter 3 Monate nach der Entbindung wieder in ihren Beruf zurückkehren, welches den Wiedereinstieg doch sehr vereinfacht.

In einem TED Talk haben Sie erläutert, dass Ihr berufliches Erfolgsrezept wesentlich aus drei Bestandteilen besteht. Was meinen Sie mit “Listen to your inner voice, be brave and keep your eye on your target”?

“Listen to your inner voice!”: Damit meine ich, dass man nicht immer nur rein rational nach seinem Kopf handeln sollte. Manchmal ist es wichtig auf sein Bauchgefühl zu hören, denn das weiß meistens am besten was gut für einen ist. Hätte ich auf meinen Kopf gehört, wäre ich damals in Frankfurt geblieben, um schneller Partnerin zu werden. Mein Bauchgefühl hat mir aber gesagt, nach Shanghai zu ziehen, um etwas Neues zu entdecken und darauf habe ich gehört. Das war sehr gut so!

“Be brave!”: Am meisten lernt man oftmals in Zeiten großer Veränderungen, wenn man seine eigene Komfortzone verlässt. Allerdings erfordert das oft großen Mut. Ich bin überzeugt davon, dass man diesen Mut aufbringen sollte, um immer wieder neue Dinge auszuprobieren – das macht das Leben so viel interessanter. Sollte die neue Herausforderung wider Erwarten nicht dem entsprechen, was man sich vorgestellt hat, dann hat man wenigstens eine neue Erfahrung gemacht – und das ist viel wert!

“Keep your eye on the target!”: Gib nicht sofort auf, wenn es einmal unangenehm werden sollte oder sich nicht gleich so entwickelt, wie man es sich erhofft hat. Lass Dich nicht von Deinem Weg abbringen.

Mit Ihrem kürzlich veröffentlichten Beitrag auf LinkedIn haben Sie dazu aufgerufen, darüber nachzudenken, welches Vorbild man sich für seine Tochter oder seinen Sohn wünscht. Welche Vorbilder wünschen Sie sich für Ihre Kinder?

In meinem Bereich fallen mir zum Beispiel Melanie van Leeuwen, Partnerin bei Derains & Gharavi in Paris, oder Simon Greenberg, Partner bei Clifford Chance in Paris ein. Sie sind beide beruflich erfolgreich und gleichzeitig sehr in das Familienleben eingebunden. Außerdem finde ich die CNN-Journalistin Christiane Amanpour sehr smart, charismatisch und mutig.

Welche Juristin hat Sie so inspiriert, dass sie als Vorbild für breaking.through nominiert werden sollte? Wieso?

Melanie von Leeuwen und Susanne Gropp Stadler, Head of Litigation bei Siemens – aus den gleichen Gründen, die ich eben genannt habe.

Nadia Darwazeh

GDPR damage claims – a potential for mass litigation in Germany?

Regulation (EU) 2016/679 – also known as General Data Protection Regulation ('GDPR') – provides for material and non-material damage claims in case of an infringement of said Regulation. After the GDPR became enforceable in 2018, these damage claims have been quite dormant for a while – the focus was rather on regulatory enforcement and in particular administrative fines. When affected individuals (the so-called ‚data subjects') went to court it was mainly to enforce data subject rights such as access to or erasure of personal data. In Germany it seems that this is about to change since courts become more and more generous when awarding non-material damages. This again has triggered the interest of a 'claimant industry' consisting of specialized claimant-side law firms, litigation funders and legal tech companies.

Damage claims under the GDPR

Article 82(1) GDPR – which is directly applicable in all EU member states – provides any person who has suffered a material or non-material damage because of an infringement of the GDPR with a claim for compensation from the controller (see Article 4(7) GDPR) or processor (see Article 4(8) GDPR) for the damage suffered. While there are sound systematical arguments that 'any person' in this context is actually limited to data subjects, it can currently not be ruled out that courts will actually interpret it in a broader sense also included other natural or legal persons. This could for example include damage claims by a controller against its processor or even sub-processor with whom the controller doesn't even have a contractual relationship. For this overview, the focus will however be on damage claims brought against controllers and processors by data subjects.

Looking at the wording of Article 82(1) GDPR the requirements for a damage claim seem to be quite simple:

- Infringement of the GDPR by the defendant in its function as a controller or processor (note: Article 82(1) GDPR cannot be exercised against individuals within the controller's/processor's organisation such as members of the management or the data protection officer);
- GDPR infringement result in a material or non-material damage for the data subject (i. e. causality); and
- Fault on the side of the defendant (i. e. intent or at least negligence).

But this is only the first glance: the question whether awarding compensation under Article 82 GDPR requires, in addition to a GDPR infringement, that the claimant has suffered a damage, or whether the infringement of provisions of the GDPR itself is sufficient for a compensation, is already pending with the Court of Justice of the European Union ('CJEU') after a referral for preliminary ruling by the Supreme Court of Justice (Oberster Gerichtshof – 'OGH') of the Republic of Austria (OGH, decision dated 14 April 2021, case number 6 Ob 35/21x).

Where a controller is generally liable for any type of GDPR infringement, the processor's liability is per se limited to processor damage caused by processing where it has not complied with obligations specifically directed to processors or where it has acted outside or contrary to lawful instructions of the controller (see Article 82(2) GDPR). An additional burden for the defendant is Article 82(3) GDPR. provides for an additional burden for a defendant as this provision states that a controller or processor shall be exempt from liability only if it proves that it is not in any way responsible for the event giving rise to the damage. German courts currently interpret Article 82(3) GDPR that the reversed burden of proof only applies to causality and fault, not to the questions whether there is a GDPR infringement or a damage suffered (e. g. Local Court [Amtsgericht – 'AG'] Frankfurt/Main, decision dated 10 July 2020, case number 385 C 155/19 (70). The latter becomes important when looking at how to determine non-material damages.

Non-material damages and how to calculate them

Material damages in terms of Article 82 can be determined relatively easily and cover financial loss (e. g. because a credit hasn't been granted or granted due to wrong credit data or an employment contract gets terminated due to an inadmissible internal investigation), compensation for bodily harm (e. g. caused by a cyber attack on a hospital) and reimbursement for legal fees when data subject rights are not complied with in due time (see Regional Court [Landgericht – 'LG'] Wuppertal, decision dated 29 March 2019, case number 17 O 178/18). The question how to determine and calculate non-material damages on the other hand, is one of the current unknowns of the GDPR. Multiple, very important questions in this regard are already pending with the CJEU.

The OGH has asked the court the following additional questions in the aforementioned referral:

- "Are there additional requirements under EU law for the determination of compensation for damages in addition to the principles of effectiveness and equivalence?"

- "Is the position compatible with EU law that it is a requirement for awarding compensation for non-material damages that there is any consequence or effect of the infringement of at least some gravity which goes beyond the mere nuisance caused by the infringement?"

The German Federal Labour Court (Bundesarbeitsgericht – 'BAG') wants to know, if damage claims under Article 82 GDPR have a preventive character which needs to be taken in to account when determining the amount of non-material damages to be awarded and whether the degree of fault of the defendant needs to be factored in (BAG, decision dated 26 August 2021, case number 8 AZR 253/20 (A)). Bulgarias highest administrative court Varhoven administrativen sad has referred several data breach-related questions to the CJEU (CJEU case number C-340/21 – Natsionalna agentsia za prihodite), inter alia:

"Is Article 82(1) and (2) [GDPR], read in conjunction with recitals 85 and 146 [of the GDPR], to be interpreted as meaning that, in a case such as the present one, involving a personal data breach consisting in unauthorised access to, and dissemination of, personal data by means of a 'hacking attack', the worries, fears and anxieties suffered by the data subject with regard to a possible misuse of personal data in the future fall per se within the concept of non-material damage, which is to be interpreted broadly, and entitle him or her to compensation for damage where such misuse has not been established and/or the data subject has not suffered any further harm?"

With more than 40 decisions on Article 82 GDPR as of now, the case law in Germany can only be described as fractured at the moment. Multiple courts have refused to award damages even after a data breach with the arguments that (a) the claimant wasn't able to demonstrate a respective damage going beyond mere subjective discomfort without any objectively measurable impact and/or (b) that the GDPR does not provide for punitive damages (e. g. AG Frankfurt/Main, decision dated 10 July 2020, case number 385 C 155/19 (70) – Marriott/ Starwood breach; LG Frankfurt/Main, decision dated 18 January 2021, case number 2-30 O 147/20 – Mastercard Priceless breach; LG Cologne, decision dated 7 October 2020, case number 28 O 71/20 – accidental disclosure of bank account record to third party). Other courts tend to award non-material damages for formal non-compliance with the GDPR such as delayed and incomplete response to a data subject access request (e. g. Labour Court [Arbeitsgericht – 'ArbG'] Düsseldorf, decision dated 5 March 2020, case number 9 Ca 6557/18: € 500 per month for the first two month, € 1,000 for each further month, € 500 for each missing category of information – total of € 5,000; Regional Labour Court [Landesarbeitsgericht – 'LAG'], decision dated 11 May 2021, case number 6 Sa 1260/20: € 1,000; ArbG Neumünster, decision dated 11. August 2020, case number 1 Ca 247 c/20: € 500 per month – total of € 1,500) or minor nuisance such as one unsolicited marketing email (AG Pfaffenhofen/Ilm, decision dated 9 September 2021, case number 2 C 133/21 - € 500). Multiple German courts, in particular labour law courts, have awarded non-material damages in the range of a few hundred (to several thousand Euros not only after inadmissible disclosure of personal data (LAG Köln, decision dated 14 September 2020, case number 2 Sa 358/20 – failure to remove professional CV from website after end of employment: € 300; AG Hildesheim, decision dated 5 October 2020, case number 43 C 145/19: € 800 for reselling unwiped PC; LG Darmstadt, decision dated 26 May 2020, case number 13 O 244/19: € 1,000 for accidentally disclosing candidate data to another applicant; LG Lüneburg, decision dated 14 July 2020, case number 9 O 145/19: € 1,000 for unauthorized report to credit reference agency; ArbG Dresden, decision dated 26 August 2020, case number 13 Ca 1046/20: € 1,500 for unauthorized disclosure of health data; AG Pforzheim, decision dated 25 March 2020, case number 13 C 160/19: € 4,000 for unauthorized disclosure of very sensitive health data; ArbG Münster, decision dated 25 March 2021, case number 3 Ca 391/20: € 5.000 for unauthorized publication of employee photo containing special categories of personal data in the form of skin colour). Whether and to what extent non-material damages will be determined and calculated in a more consistent way in the future heavily depends on the outcome of the aforementioned pending CJEU cases.

Looking at the UK, the Supreme Court decided in the case Lloyd v Google LLC where the claimant sued for £ 3 billion in damages (£ 750 per affected data subject, 4 million Apple iPhone users affected by Google's alleged unauthorized collection of Safari browser information) that damages for data privacy infringements require a "damage" in terms of "material damage (such as financial loss) or mental distress distinct from, and caused by, unlawful processing of personal data in contravention of the [Data Protection Act 1998], and not to such unlawful processing itself" (decision dated 10 November 2021, case number UKSC 2019/0213). That said, in the UK damages cannot be awarded to individuals for the mere loss of control of their data, if the loss of control does not result in material damage or mental distress. It remains to be seen whether the CJEU will take a similar approach when deciding on Article 82 GDPR.

A scenario for mass litigation?

Since – except for serious cases of GDPR infringements – claims for non-material damages under Article 82 GDPR are rather in the range of three- to low four-digit amounts per case in Germany, individual enforcement is not very effective. Like air passenger or tenant rights claims, a scenario where small claims meet a potentially large number of potential claimants (e. g. after a data breach, data scandals relating to misuse of a large number of employee or customer data or after large bulks of marketing emails have been sent without proper consent), naturally attracts institutional claimants trying to compile such claims to process them in a cost-efficient way using legal tech and to put pressure on the defendant to settle. Several franchises have already started exploring how to commercialize GDPR damage claims, including legal tech company RightNow.

Since German law does not provide for a proper class action mechanism comparable to those know for example under UK or US law, such commercialization of GDPR damage claims is not that simple. The so-called Model Declaratory Action (Musterfeststellungsklage) is not very suitable since (a) only non-profit organizations (e. g. consumer protection organizations) can initiate such action and (b) it is not aimed at awarding payments, but rather at deciding about the factual or legal requirements for a claim or legal relationship. Furthermore, it is currently highly disputed whether and to what extent the Model Declaratory Action is compatible with the requirements for exercising the right to receive compensation under Article 82 GDPR on behalf of a data subject as set out in Article 80(1) GDPR. Therefore, even consumer protection organizations currently refrain from using the Model Declaratory Action in connection with GDPR damages and are waiting for the outcome of CJEU case Facebook Ireland (C-319/20).

That said, institutional claimants currently try to compile GDPR damage claims for a 'synthetic' class action by purchasing such claims from affected data subjects who then assign the claim to the institutional claimant. This model however has one crucial flaw: it is currently highly disputed in Germany whether claims for non-material damages (which are the claims the institutional claimants ae preying on) under Article 82 GDPR can actually be assigned. In 2020, the AG Hannover (decision dated 9 March 2020, case number 531 C 10952/19) decided that claims for non-material damages under Article 82 GDPR are personal in nature and consequently cannot be assigned:

"The plaintiff is not authorized to assert any claims of his wife pursuant to Article 82(1) GDPR on the basis of assigned rights. Insofar as claims for compensation for non-material damage are asserted by way of assignment by third parties, there is - due to the lack of transferability of this highly personal claim - no active legitimation, Spittka, GRUR-Prax 2019, 475, 477."

In a recent decision the LG Essen came to a contrary conclusion and found that claims for non-material damages can be assigned like any other claim (decision dated 23 September 2021, case number 6 O 190/21). It needs to be said that the court did not explain its reasoning very well and didn't even reflect the AG Hannover's position. Nevertheless, if the position of the LG Essen became the prevailing opinion, the floodgates for Article 82 GDPR mass litigation would be wide open and we would potentially see Diesel-like civil actions after every larger data breach or data scandal. As data privacy litigation has been identified as a quite lucrative market by specialized claimant-side law firms, litigation funders and legal tech companies in Germany, in particular due to the recent spike in cyber-attacks on companies and other organizations, it is very likely that the decision by the LG Essen will fuel further attempts to commercialize Article 82 GDPR. It remains to be seen what position other German courts and at the end of the day the CJEU will take. A low – or even no – threshold for awarding compensation for non-material damages combined with free assignability of such claims would be the perfect storm from a defendant's perspective which could even put GDPR fines in the shade. Imagine € 300 for one unsolicited marketing email and a batch of 100,000 recipients or a data breach affecting 150,000 or more data subjects.

Jan Spittka

Lloyd v Google: Supreme Court unanimously rules in favour of Google

On 10 November 2021, the Supreme Court handed down its judgment in the case of Lloyd (Respondent) v Google LLC (Appellant). The Supreme Court unanimously allowed the appeal, ruling in favour of Google. We have been tracking the case as it has been progressing through the courts due to its potentially far-reaching consequences, testing the extent to which damages may be awarded to individuals for the mere loss of control of their data.

Background and Issues

Mr Lloyd, a consumer rights activist and former director of Which?, issued a claim alleging that Google breached the duties that it owed to over 4 million Apple iPhone users as a data controller under the Data Protection Act 1998 (the "**DPA 1998**"), during a period of some months in 2011-2012, when Google was allegedly able to collect and use their browser generated information as a result of a Safari workaround. Mr Lloyd sued on his own behalf and on behalf of a class of other residents in England and Wales whose data was collected in this way and applied for permission to serve the claim out of the jurisdiction. More information on the Court of Appeal judgment and the Supreme Court hearing can be found here and the three key questions addressed by the Supreme Court were:

- Are damages recoverable under the DPA 1998 for "loss of control" of data, without needing to identify any specific distress or pecuniary loss?
- Does the proposed group of individuals satisfy the "same interest" test as required for a representative action in England and Wales to proceed?
- Should the Court exercise its discretion and disallow the representative action proceeding in any event?

Decision by the Supreme Court

The Supreme Court unanimously allowed the appeal, in favour of Google. When handing down the judgment, it was announced that whilst a representative claim could have been brought to first establish a claim in principle against Google with a view to then pursuing individual claims once established, Mr Lloyd had not adopted this two-stage process. The Court emphasised the fact that Mr Lloyd had argued that the class could be assessed as one with a uniform sum being recovered, citing that £750 had been suggested in correspondence. It was the Supreme Court's decision that the claim cannot succeed for two reasons, namely:

- The claim is founded solely on s.13 DPA 1998 which provides that "an individual who suffers damage by reason of any contravention by a data controller of any of the requirements of this Act is entitled to compensation from the data controller for that damage." The Supreme Court held that on proper interpretation of this section, the term "damage" refers to "material damage (such as financial loss) or mental distress distinct from, and caused by, unlawful processing of personal data in contravention of the Act, and not to such unlawful processing itself" [90]-[143]; and

– The Supreme Court disagreed that a uniform sum could be recovered and held that it is necessary to prove what unlawful processing by Google of personal data relating to a given individual occurred. When the Supreme Court orally handed down the judgment, it was commented that things like the period of time, volume of data, whether any sensitive or private data was involved and what use or benefit it afforded Google would need to be considered per individual. Absent evidence of these matters, the individuals are not entitled to compensation.

In any event, the Supreme Court held that to receive compensation under the DPA 1998 for any individual "it would be necessary to show both that Google made some unlawful use of personal data relating to that individual and that the individual suffered some damage as a result." The Supreme Court's judgment states that without proving either matter the claimant's attempt to recover compensation is "doomed to fail".

In summary, the Supreme Court refused Mr Lloyds application for permission to serve the proceedings on Google outside of the jurisdiction of England and Wales.

What is the impact?

The judgment reiterates the need for claimants to demonstrate damages, whether they are in the form of distress or financial loss, to successfully claim pursuant to s.13 of the DPA 1998. The decision places boundaries around the categories of individuals who are likely to succeed in claiming damages and reinforces the de minimis approach taken by the courts to date. On the topic of damages, the Supreme Court held that "compensation can only be awarded under section 13 of the DPA 1998 for material damage or distress caused by an infringement of a claimant's right to have his or her personal data processed in accordance with the requirements of the Act, and not for the infringement itself" [143]. This confirms that the right to damages pursuant to s.13 DPA 1998 is not automatic; the claimant must prove material damage or distress. This is likely to have a very significant impact on a number of existing claims and those waiting in the wings.

The Supreme Court's decision shows an unwillingness to group individuals and award a "uniform sum" for damages without properly inspecting the circumstances of their claims and requiring those circumstances to be proven. The Supreme Court provided some helpful guidance around the factors that may differentiate individual data subjects, such as the volume and categories of data, the sensitivity of that data and the benefit afforded to the data controller as a result of the misuse.

The decision that the representative action should not be allowed to proceed in any event is in line with the trend that "opt-out" representative actions, as seen in the US, are not commonplace in the UK data protection litigation landscape. This is consistent with the current climate in the UK and does not further open the floodgates for claimants to make claims on behalf of large swathes of individuals without those individuals first being identified and particularising their claim.

The decision itself provides some very welcome commentary on damages for data protection claims and the approach to class actions in the UK and more analysis will follow as we digest this ground-breaking decision. This will include mapping out the impact as against the current regime pursuant to the DPA 2018 and the UK GDPR.

Rosehana Amin

Helen Bourne

Ian Birdsey

Madeleine Shanks

Investor-state arbitration and climate change: a plate-spinning act?

Nowadays, the parameters that define the human race's ability to survive are being redrawn. Past generations have lived through countless wars, widespread famine, droughts, and unexpected catastrophes. The difference between then and now is that we are on the brink of reaching climate-linked tipping points.

As supported by overwhelming scientific evidence, including the latest climate report published by the UN's Intergovernmental Panel on Climate Change (IPCC) on 9 August 2021,[1] if the levels of greenhouse gases in the atmosphere push global temperatures beyond these tipping points in the near future, this will lead to severe and irreversible consequences for future generations.[2] Accordingly, climate change poses an existential threat to the survival of life, as we know it, on our planet. No-one assumes that reducing our collective carbon footprint can succeed solely based upon voluntary co-operation among businesses, governments and individuals. For better or worse, this mighty endeavour requires enforcement and regulatory intervention. Here lies the complexity. Planning and implementing regulatory measures aimed at combating climate change requires governments to spin many plates simultaneously, juggling the potentially conflicting objectives of multiple interests and actors. (The current Covid-19 pandemic adds further complexity to the mix). Governments accordingly find themselves in a complex position where diverging interests will clash and, continuing with the analogy, plates may break.

The field of climate change litigation presents a paradigm of the position in which governments are found. It is no coincidence that many of the growing number of climate-related disputes—it is estimated that these disputes have almost doubled since 2017[3] — are against governments.

Some governments have been sued for doing too little in response to the climate crisis. Some have been sued for what can be characterised as doing too much, particularly under investment treaties. Others have been sued, also under investment treaties, for reversing measures ultimately aimed at combating climate change.

Here, we take stock of current litigation and arbitration trends relating to climate change, discuss the measures being taken in response to climate-related investment treaty claims and offer our thoughts on what governments could do to prevent the proliferation or escalation of such disputes.

Doing too little? Court litigation and potential investment treaty claims

Let us begin with situations in which governments have been sued for doing too little. Typically, such cases are based on constitutional or human rights law, or administrative and planning legislation. Claimants have succeeded in four landmark cases against France, Germany and the Netherlands.

In France, on 1 July 2021, the highest Administrative Court (*Conseil d'État*) issued a landmark ruling in the *Grande-Synthe* case, giving the government nine months to take all necessary measures to curb greenhouse gas emissions produced on the national territory to ensure it complies with its national climate targets under the Paris Agreement.[4] This decision comes in the wake of another historic French ruling earlier this year in *Notre Affaire à Tous and others v France*. In this case, the Paris Administrative Court (*Tribunal Administratif de Paris*) considered a claim based on Articles 2 and 8 of the European Convention on Human Rights (**ECHR**),[5] the

1. Available at: https://www.ipcc.ch/report/ar6/wg1/downloads/report/IPCC_AR6_WGI_Full_Report.pdf.

2. Further information available at: https://www.nature.com/articles/d41586-019-03595-0.

3. UN Environment Programme, available at: https://wedocs.unep.org/bitstream/handle/20.500.11822/34818/GCLR.pdf?sequence=1&isAllowed=y

4. The rate of decline in greenhouse gas emissions in France between 2015-2018 was about half as fast as needed to be on the path to achieving its target of reducing greenhouse gases by 40% of their 1990 levels by 2030. Available at: https://www.conseil-etat.fr/actualites/actualites/emissions-de-gaz-a-effet-de-serre-le-conseil-d-etat-enjoint-au-gouvernement-de-prendre-des-mesures-supplementaires-avant-le-31-mars-20225.

5. These protect the right to life and the right to a private life, family and a home.

French Charter for the Environment and the general principle of law protecting every citizen's right to live in a preserved climate system.[6] On 3 February 2021, the court held that the French government was liable for failing to achieve its targets for cutting greenhouse gas emissions, and this had resulted in environmental damage. However, the court refused to award damages for ecological harm since, according to the court, this might be reversible. The court awarded the claimants (four NGOs) the "*symbolic sum of 1 euro for moral prejudice*" and ordered the government to disclose the steps it plans to take to meet France's climate targets and carbon budgets.

In Germany, a claim filed by young environmental activists has resulted in the country's Federal Constitutional Court ruling on 24 March 2021 that Germany's Federal Climate Change Act 2019[7] is incompatible with fundamental rights because it leaves much of the burden of reducing emissions to years after 2030.[8] The court laid down a new "inter-generational standard" *for climate protection as a human right, stating that "practically every freedom is potentially affected [by these future emission reduction obligations], because today almost all areas of human life are bound up with greenhouse gas emissions […] and could therefore be threatened by drastic constraints after 2030".*[9] The ruling is based, among other things, on Article 20(a) of the German Constitution (*Grundgesetz*), which requires the government to take climate action, and Germany's obligations under the Paris Agreement. The court has ordered the government to enact provisions by the end of 2022 that specify in greater detail how reductions in emissions are to be adjusted after 2030.

In the Netherlands, the Dutch Supreme Court in 2019 heard a landmark climate justice case, *Urgenda Foundation v Netherlands*, concerning the Dutch government's efforts to reduce greenhouse gas emissions.

An initial ruling in 2015 accepted that the Dutch government had a constitutional duty to protect its citizens from climate change and ordered it to take more ambitious action by reducing emissions by at least 25% by the end of 2020, compared to 1990. The judgment was appealed, but ultimately upheld by the Dutch Supreme Court, which affirmed that the government had breached its duty of care under Articles 2 and 8 of the ECHR.[10]

In contrast with these cases in mainland Europe, claimants have been less successful in climate change-related cases pursued against the US and UK governments.

In Juliana v USA, 21 young people and the organisations Earth Guardians and Future Generations alleged that, by maintaining a national energy system powered by fossil fuels long after knowing that it contributes to climate change, the US government was violating their constitutional rights to life, liberty and property. On this basis, they requested an order that the US Federal Government devise a remedial plan for the reduction of greenhouse gas emissions. The Court of Appeals for the Ninth Circuit refused the request, holding (by a majority) that "*any effective plan would necessarily require a host of complex policy decisions entrusted to the wisdom and discretion of the executive and legislative branches*."[11]

In the UK Supreme Court case of R *(Friends of the Earth Ltd and others) v Heathrow Airport Ltd (2020)*, the claimants tried to block expansion of Heathrow Airport.[12] They argued that the expansion was inconsistent with government climate targets, but the court held, among other things, that the mere announcement of such targets did not constitute "*government policy*" for the purposes of the relevant planning legislation.[13] It is worth noting, however, that permission for the expansion project has yet to be given, and climate change issues may be considered again at a later stage.

6. "The case documents are available to download at: http://climatecasechart.com/non-us-case/notre-affaire-a-tous-and-others-v-france/?cn-reloaded=1.

7. Federal Climate Protection Act (Bundes-Klimaschutzgesetz) of 12 December 2019 (Federal Law Gazette I, p. 2513).

8. BVerfG, Beschluss des Ersten Senats vom 24. März 2021 - 1 BvR 2656/18 -, Rn. 1-270, available at: https://www.bundesverfassungsgericht.de/e/rs20210324_1bvr265618.html. See also the court's press release 31/2021 of 29 March 2021, available at: https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2021/bvg21-031.html.

9. Ibid, paragraph 117.

10. 19/00135 - judgment of 13 January 2020. The decision is discussed in: https://resilience.clydeco.com/articles/urgenda-decision-by-the-supreme-court-of-the-netherlands.

11. 947 F.3d 1159 (9th Cir. 2020). Available at: https://harvardlawreview.org/2021/03/juliana-v-united-states/.

12. [2020] UKSC 52. Available at: https://www.supremecourt.uk/cases/uksc-2020-0042.html.

13. Section 5(8) of the Planning Act 2008.

In addition, states in theory could face claims under investment treaties on the basis that their insufficient action has harmed an investment. Most countries in the world have concluded a network of hundreds of bilateral and multilateral investment treaties (**BITs** and **MITs**, respectively) that offer significant legal protections. Most of such treaties, the majority of which were concluded in the 1990s and 2000s, are silent on climate change issues.

In particular, many investment treaties contain a guarantee referred to as the "full protection and security" (**FPS**) standard. In general terms, under this guarantee, states have the duty to protect relevant investments from harm. Accordingly, in theory, investors could invoke the FPS standard to allege that states have failed to take relevant preventative measures against climate change, putting foreign investors at risk of loss or damage to their investments (for example, investors whose investments suffer damage due to droughts or hurricanes).[14] In addition, many investment treaties afford broad protections under the fair and equitable (**FET**) standard.[15] Due to the breadth of this standard, investors may also try to advance climate change-related claims under the FET protection. A key question in respect of such potential claims will relate to the causal link between inaction and harm.

Doing too much? Investment treaty claims

While governments are facing claims urging greater speed and more radical action, they must also defend claims made by international investors in respect of regulatory measures taken (or said to be taken) to combat climate change. These claims are generally based on investment treaties. In this context, typically, an investor alleges that a treaty provision has been breached by a state introducing environmental legislation or regulations, implementing them in a certain way, or changing the way they work.

The question that is virtually always at the heart of the Investor-State Dispute Settlement system (**ISDS**) (and the law of expropriation or takings at a municipal level for that matter) relates to risks and, ultimately, money: whether the state or the investor should bear the risk of losses arising from the regulatory changes in issue. Thus, in the context of states taking measures to combat climate change, the question is often who should bear the losses arising from the phasing out of unclean energy sources. Is it the investor (whose assets run the risk of being stranded) or the state (which may be under budgetary constraints)?

It is important to note that a public purpose—for example, addressing the climate crisis—does not in itself amount to a reason to make investors pick up the tab. This flows from the provisions on legal expropriation contained in most investment treaties that rest on the notion that investors whose property is taken for public purposes ought to receive compensation.

For example, the question as to "who pays" was put forward in February 2021 by the German utility company, RWE, which filed an Energy Charter Treaty (ECT)[16] claim for compensation against the government of the Netherlands, which plans to end all coal-fired power production by 2030. RWE alleged that it has not been given sufficient time or funds to carry out the necessary works for its power plant in Eemshaven to transition from burning coal to biomass. The Eemshaven plant is less than six years old, as is another power plant run by Uniper, another German utility company which has reportedly threatened legal action.[17]

14. The tribunal's application of the FPS standard to the protection of an eco-tourism site in Allard v. Barbados shows a willingness to consider a state's obligation to protect an investment from environmental harm under the FPS standard. However, in this particular case, the tribunal concluded, on the merits, that Barbados was "aware of the environmental sensitivities of the [Claimant's investment]" but had taken " reasonable steps to protect it" (PCA Case No. 2012-06, Award, 27 June 2016, para. 242).

15. See for example, Article 5 of the UK Model BIT, which states, *"Investments of nationals or companies of either Contracting Party shall not be nationalised, expropriated or subjected to measures having effect equivalent to nationalisation or expropriation (hereinafter referred to as "expropriation") in the territory of the other Contracting Party except for a public purpose related to the internal needs of that Party on a non-discriminatory basis and against prompt, adequate and effective compensation. Such compensation shall amount to the genuine value of the investment expropriated immediately before the expropriation or before the impending expropriation became public knowledge, whichever is the earlier, shall include interest at a normal commercial rate until the date of payment, shall be made without delay, be effectively realizable and be freely transferable"* (emphasis added). Available at: https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2847/download

16. The ECT was signed in December 1994 and entered into legal force in April 1998. Currently there are 53 Signatories and Contracting Parties to the ECT, including both the European Union and Euratom.

17. Information available at: https://www.politico.eu/article/eu-government-climate-and-coal-lawsuits/

Reversing course? Investment treaty claims

Meanwhile, renewable energy investors have been using investment treaties to claim against states for allegedly reversing course in respect of regulatory frameworks designed to encourage investment in the renewable energy sector. Spain, Italy and the Czech Republic have been badly hit by these claims. For instance, within a period of just ten weeks (from 31 May to 2 August 2019), five different arbitral tribunals ordered Spain to pay investors compensation for the reform of its solar energy incentive scheme, mainly on the basis of breaches of the duty of the FET standard in the ECT[18]. To date, over 40 such claims have been pursued against Spain. 13 ECT claims have been lodged against Italy and six against the Czech Republic as a result of these countries' decisions to modify their original renewable energy investment incentive frameworks, which had been implemented in the early and mid-2000s.[19]

Elsewhere, Romania is also defending a claim, brought under the ECT by LSG Building Solutions and others, in relation to a scheme based upon green certificates that encouraged investment in renewable energy.[20] While the scheme was successful in boosting the production of renewable energy, it also led to price rises for consumers. On this basis the Romanian government reformed the scheme and reduced the number of certificates issued. The claimants allege that this reform caused them losses of more than £250m.

Claims of this kind are not limited to Europe or the ECT. The Koch group of companies, for example, has filed a claim against Canada under the North American Free Trade Agreement (**NAFTA**) in relation to the Ontario provincial government's decision in 2018 to cancel a cap and trade programme aimed at reducing carbon emissions. The claim was based not just on the cancellation itself, but on legislation limiting legal redress and compensation, which the Koch group argued amounted to unlawful expropriation under NAFTA.

18. See Clyde & Co's series of Solar Wars articles on ECT claims against Spain and others, including: https://www.clydeco.com/en/insights/2019/09/solar-wars-part-x-the-force-is-strong-with-investo.

19. Information available at: https://www.energychartertreaty.org/cases/list-of-cases/.

20.This scheme was introduced by the Romanian government in October 2011 in response to the EU's 2009 Renewable Energy Directive, which required Member States to reach certain targets for renewable energy by 2020. In particular, the scheme included a requirement that energy distributors purchase "green certificates" to be issued to wind, hydro and solar power producers, who could then resell them. Further information is available at: https://globalarbitrationreview.com/romania-faces-icsid-claim-over-cuts-renewable-energy-incentives.

The Koch group, which has bought and sold publicly issued emissions allowances, alleges that it has suffered losses exceeding US$30m as a result.[21]

Fighting on several fronts

Governments therefore find themselves fighting legal battles on several fronts. They must grapple with the tension between, on the one hand, going further and faster with environmental legislation, particularly to pre-empt claims by NGOs and others, and, on the other hand, ensuring they fully meet their legal obligations to international investors. There are different ways in which governments are dealing or may deal with this (perceived or real) tension or dilemma.

First approach that governments may adopt: Replacing or amending investment treaties

A first approach consists of ensuring that investment treaties have provisions that deal with climate change issues. At least three potential courses of action exist.

First, in theory, the most straightforward course is for states to agree to new bilateral investment treaties. Here, states have freedom to deal with climate change issues as they see fit. For example, the Netherlands' model BIT of 2019 makes specific reference to environmental protection.[22] The chink in the armour is that in many cases, investment treaties may already be in place.

The second course involves amending existing treaties. Two scenarios exist.

First, in relation to BITs, two contracting state parties could agree to add provisions on climate change to an existing treaty. This, however, could give rise to complex situations, particularly if disputes are already afoot.

21. Further information is available at: https://globalarbitrationreview.com/new-icsid-claims-against-canada-and-kuwait.

22. Article 7 of this model BIT starts by saying that "*Investors and their investments shall comply with domestic laws and regulations of the host state, including laws and regulations on human rights, environmental protection and labor laws*". However, the precise effect of this wording is unclear, since Article 7 goes on to refer to the voluntary nature of "*internationally recognized standards, guidelines and principles of corporate social responsibility*", and it is headed "*Corporate Social Responsibility*". Nevertheless, investors are reminded of the "*importance of investors conducting a due diligence process to identify, prevent, mitigate and account of the environmental and social risks and impacts of its investment*" (Article 7(3)). Whether future model bilateral investment treaties will adopt similar wording, or go further than this, is not yet clear. The full text of this model BIT is available at: https://investmentpolicy.unctad.org/international-investment-agreements/model-agreements.

Of course, the state parties could instead agree to terminate the treaty in issue and replace it with a new treaty that contains climate-change related provisions. This approach, however, can give rise to thorny questions, at least in two respects. First, significant issues may arise in relation to existing disputes. Second, issues are likely to arise from the effect of sunset clauses protecting the rights of investors for some years after termination.

Second, a more complex scenario involves amending multilateral treaties, particularly ones with numerous state parties. The ECT, with 53 signatories and contracting parties (including the EU and Euratom), is particularly relevant.[23] The EU Commission has argued that the ECT needs a general overhaul. In particular, it has described the ECT's investment protection provisions as "*outdated*", saying that they no longer "*correspond to modern standards*". [24]Among other things, it wants an explicit right for contracting states to legislate to achieve "*legitimate public policy objectives*".[25]This is partly to do with state aid, but also with the EU Commission's view that, without fundamental reform of the ECT, it may not be able to reach its goal of carbon neutrality by 2050. Somewhat echoing the EU Commission's concerns, in an open letter signed by almost five hundred scientists and climate leaders, the ECT has been described as a "*major obstacle to implementation of the Paris Agreement and the European Green Deal*".[26]

Without engaging in a debate as to whether the ECT is or is not such an obstacle, one should not lose sight that this treaty provides a framework that protects investments in all kinds of energy, including renewables. In other words, the availability of the protections offered by the ECT makes investing in the renewable energy sector more attractive. Various options have been considered to amend the ECT, including the EU's proposal to phase out the investment protection of fossil fuels. The last round of negotiations in this respect took place in Brussels in July 2021.[27]

A "nuclear option" of simply ditching the ECT altogether is far from straightforward. As the ECT is a multilateral treaty, according to the Vienna Convention on the Law of Treaties (**VCLT**), bringing the treaty to an end in general would require the consensus of all contracting parties[28]. This is unlikely.

Thus, in practice, the states that are unhappy with the ECT are left with only one option: withdrawing from ("denouncing") the treaty. Italy notified its withdrawal on 31 December 2014, becoming effective on 1 January 2016.[29] The ECT, however, contains a sunset provision at Article 47(3), under which existing investments are protected for 20 years after the date of withdrawal becomes effective.[30] Thus, investors who made qualifying investments in Italy prior to 1 January 2016 will still receive full protection under the ECT until January 2036. Accordingly, a state's withdrawal does not achieve a quick end to the protections that the ECT affords.

Second approach that governments may adopt: Managing investors' expectations

As a second approach, governments may be able to deal with the tension alluded to above within the existing investment treaty framework (including the ECT). Most disputes involving the "too much" and "reversal" aspects discussed here relate to regulatory stability. The FET standard lies at the heart of most such disputes, in particular the obligation of a host state to respect the legitimate expectations that led an investor to invest in the country. An investor's legitimate expectation in many such cases relates to the stability of the regulatory system. In the cases involving Spain, Italy and the Czech Republic, for example, claimant-investors have argued that they committed to long-term investments in the renewable energy sector in reliance on the states' promises of stability of the incentives they once offered.[31] The disputes have often centred on what the states specified in the relevant legislation or regulations, and what the investors should have understood at the time.

23. Information available at: https://www.energychartertreaty.org/treaty/contracting-parties-and-signatories/.

24. Information available at: http://trade.ec.europa.eu/doclib/press/index.cfm?id=2017.

25. For discussion of the European Union's approach to the ECT, see: https://www.clydeco.com/en/insights/2019/09/solar-wars-part-xi-the-ec-strikes-back.

26. Information available at: http://www.endfossilprotection.org/.

27. Information available at: https://trade.ec.europa.eu/doclib/press/index.cfm?id=2286.

28. Article 54(b) VCLT states: "*The termination of a treaty or the withdrawal of a party may take place […] at any time by consent of all the parties after consultation with the other contracting States.*" The full text is available at: https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf.

29. Information available at: https://www.energycharter.org/who-we-are/members-observers/countries/italy/.

30. Article 47(3) ECT, available at: https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2427/download.

31. See, for example, *Masdar Solar and Wind Cooperatief UA v Kingdom of Spain*, ICSID Case No. ARB/14/1, Award, 16 May 2018, paras. 461-468; *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic*, ICSID Case No. ARB/14/3, Award, paras. 163-168.

For example, in *Masdar Solar and Wind Cooperatief UA v Kingdom of Spain*,[32] the tribunal concluded that the investor's expectations were legitimate, partly because it had complied with specific conditions enabling it to benefit from the stability offered by Spanish legislation and had conducted extensive due diligence in this respect. Here, the tribunal considered the different kinds of commitments that the government had made. It found that the claimant's expectations had not been met, and the FET standard in Article 10(1) of the ECT had been breached, resulting in an award of approximately EUR 65m plus interest.

By contrast, in *Foresight Luxembourg Solar 1 S.Á.R.L., and others v Kingdom of Spain*,[33] a dissenting tribunal member refused to accept that the claimants had conducted adequate due diligence, which he said was a "*prerequisite for the viability of a legitimate expectations claim*".[34] However, the majority took a different view, finding for the investors and concluding that they had a legitimate expectation that the country's legal and regulatory framework would not be "*fundamentally and abruptly altered*", thereby depriving them of a significant part of their projected revenues.[35]

Against this backdrop, the recommended approach for limiting stability-related claims, particularly based upon legitimate expectations, not surprisingly, is increased clarity. Governments and legislatures should ensure that it is clear from the outset what changes in law and regulations a foreign investor can expect for investments in the country in certain fields. The limits, ideally, should be self-explanatory—warts and all—to avoid debates taking place before an arbitral tribunal if changes are enacted. A focus on regulatory clarity would help to resolve the tension between the desire of a government to retain its regulatory prerogatives with the need to entice foreign investment into the country. Clear legislation and regulation would avoid trapping investors into the pitfall of what is sometimes referred to as the "obsolescing bargain": once a country has attracted and benefitted from a desired investment, the tables are turned to the detriment of the investor. If a state's normative framework clearly establishes the scope and limits of the regulations applicable to foreign investments in a specified sector (for example, energy), this would prevent an investor from claiming that the state has thwarted its legitimate expectations by introducing predictable changes in this sector.

Third approach that governments may adopt: Non-investment considerations once a dispute has arisen

In principle, in investment treaty arbitrations, states may put forward arguments based upon non-investment considerations—that is, states' environmental, human rights and public health obligations under international law.

In such cases, tribunals will need to resolve the tensions that exist between conflicting obligations that may arise in certain situations, for example, balancing the need to protect the environment with the need to guarantee the protection of the investor. In practice, there are few rules in customary international law governing which obligation should take precedence over the other, or more broadly, dealing with the tension involving different obligations. The defence of necessity can be viewed as a rule dealing with such tension.[36] In specific situations, a state may argue that a breach of an investment treaty is justified by the need to preserve a non-investment consideration such as human rights or the environment.[37] The defence of necessity was the subject of several investment cases relating to the emergency measures that Argentina adopted during its 2000-2001 financial crisis. For example, in *Suez v Argentina*, the Argentine

32. ICSID Case No. ARB/14/1, Award, 16 May 2018.

33. *Foresight Luxembourg Solar 1 S.Á.R.L., and others v Kingdom of Spain*, SCC Case No. 2015/150, Final Award, 14 November 2018.

34. *Foresight Luxembourg Solar 1 S.Á.R.L., and others v Kingdom of Spain*, SCC Case No. 2015/150, Final Award, Partial Dissenting Opinion of Co-Arbitrator Raul E. Vinuesa, para. 40.

35. *Foresight Luxembourg Solar 1 S.Á.R.L., and others v Kingdom of Spain*, SCC Case No. 2015/150, Final Award, 14 November 2018, para. 365.

36. The defence of necessity is usually evaluated according to the criteria in Article 25 of ILC Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA). In order to successfully invoke the necessity defence, a state's action in question must be "*the only way for the [s]tate to safeguard an essential interest against a grave and imminent peril*" and it must "*not seriously impair an essential interest of the [s]tate or [s]tates towards which the obligation exists, or of the international community as a whole.*" Thus, this defence poses a substantial threshold for states.

37. The concept of necessity is a corollary to the concept of self-preservation, i.e. the notion that states have the fundamental right to exist and the consequent right to self-preservation of its "*essential interests*" within the meaning of Article 25 of ARSIWA. Historically, a State's "*essential interests*" were restricted to those necessary to maintain its existence in the context of a military threat. However, the concept has since been broadened, beginning with the ICJ in the *Gabčíkovo-Nagymaros* case, in which environmental protection was also accepted as a potential "*essential interest*". See *Gabčíkovo-Nagymaros Project, (Hungary v. Slovakia)*, Judgment, ICJ Reports 7 (1997), para. 53.

government claimed that human rights law required it to adopt certain measures to "*safeguard the human right to water*" of its inhabitants.[38] However, in practice, the defence of necessity has had limited success. This is not because it brings into play non-investment considerations, but because under customary international law strict conditions must be satisfied for this defence to work.[39] In addition, investment treaty tribunals have not adopted a uniform approach in their interpretation and application of necessity.[40]

Alternatively, some authors posit that tribunals may be able to consider environmental obligations as part of the applicable law of an investment treaty dispute. This is referred to as the principle of systemic integration, enshrined in Article 31.3(c) of the VCLT, which provides that, when interpreting the terms of treaties, "*any relevant rules of international law applicable in the relations between the parties*" shall be "*taken into account, together with the context*".[41] As a commentator has observed,[42] the VCLT was drafted to assist with the interpretation of treaties, not to settle treaty conflicts. The systemic integration principle does not require a choice to be made between conflicting state obligations. It simply allows tribunals to interpret norms of investment protection—especially broadly formulated provisions such as the FET standard—by reference to existing obligations that do not, strictly speaking, relate to investment protection.[43]

Although the systemic integration principle is not explicitly referred to in any investment arbitration awards, some investment treaty tribunals have supported the view that investment treaties must be interpreted within a wider juridical context, incorporating, amongst other things, different sources of international law.[44] It remains to be seen whether this approach will have traction in the context of states adopting measures in compliance with their obligations under the Paris Agreement.

Balancing all the spinning plates

As the world transitions to a greener economy, governments must adapt to complex new realities within existing legal frameworks, including under existing international investment treaties.

In the context of investment treaty law, states should focus on increasing their regulatory clarity to reconcile the different interests at stake. Clarity in new legislation and regulations introduced by a state would have numerous benefits. It would provide guidance for arbitral tribunals to assess whether the expectations of investors at the time of investing were legitimate or not. It would do away with the risk of states engaging in "obsolescing bargains" with foreign investors. Ultimately, it may lead to fewer investment treaty claims against governments as they continue their efforts to mitigate and adapt to climate change. There is an awful lot to do, but this would be a good start.

Alejandro Garcia

Melanie Martin

38. *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic*, ICSID Case No. ARB/03/19, Decision on Liability, 30 July 2010, para. 252.

39. As explained at footnote 32 above.

40. For example, the ICSID cases of CMS Gas v Argentina and LG&E v Argentina arose from Argentina's financial crisis of 2001-2002 and ensuing emergency legislation. Despite the virtually identical facts and circumstances considered in both cases, the tribunals came to opposite conclusions. The LG&E tribunal found that Argentina had met the requirements for the defence of necessity, while the CMS tribunal found that it had not (*LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006; *CMS Gas Transmission Co v Argentina*, ICSID Case No. ARB/01/8 ICSID, Award, 12 May 2005).

41. Available at: https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf.

42. De Brabandere, Eric, Human Rights and International Investment Law (March 26, 2018), p. 17. Eric De Brabandere, 'Human Rights and International Investment Law', in Markus Krajewski and Rhea Hoffmann (ed.), Research Handbook on Foreign Direct Investment (Cheltenham: Edward Elgar) (Forthcoming), Grotius Centre Working Paper 2018/75-HRL, Leiden Law School Research Paper, Available at SSRN: https://ssrn.com/abstract=3149387.

43. Ibid.

44. For example, the tribunal in Asian Agricultural Products Limited v Democratic Socialist Republic of Sri Lanka stated: "[T]*he Bilateral Investment Treaty is not a self-contained closed legal system limited to provide for substantive material rules of direct applicability, but it has to be envisaged within a wider juridical context in which rules from other sources are integrated through implied incorporation methods … whether of international law character or of domestic law nature*" (ICSID Case No ARB/87/3, Award, para. 21).

BGH: Absenken der Substantiierungspflicht in einem medizinischen Produkthaftungsstreit

Mit Beschluss vom 16.02.2021 (VI ZR 1104/20) hat der Bundesgerichtshof zur Substantiierungspflicht in einem medizinischen Produkthaftungsrechtsstreit Stellung genommen. Konkret ging es um die Frage, welche Anforderungen an die Darlegung und den Beweis eines (Medizin-)Produktfehlers nach § 3 ProdHaftG zu stellen sind.

Gegenstand des Rechtsstreits war eine der Klägerin eingesetzte Hüftprothese, die aus Klägersicht wegen eines erhöhten Metallabriebs im Sinne von § 3 ProdHaftG fehlerhaft ist. Zur Begründung legte die Klägerin Befunde einer regelmäßig stattfindenden Chro m-Kobalt-Blutuntersuchung vor. Der gerichtlich bestellte Sachverständige kam indes zu dem Schluss, dass die Blutwerte unter dem Grenzwert für eine erhöhte Metallpartikelbelastungen lägen. Daraufhin beantragte die Klägerin die Einholung eines orthopädischen Gutachtens, die sie mit attestierten Symptomen eines Pseudtumors als mögliche Reaktion auf ungewöhnlich hohe Metallpartikelbelastungen begründete. Daneben führte sie die unauffälligen Blutwerte auf die Bildung von Metalldepots zurück, welche im Blut nicht feststellbar seien. Das Oberlandesgericht München hielt diesen Vortrag nicht für hinreichend substantiiert und lehnte den Beweisantrag der Klägerin sowie die Berufung ab.

Nach Auffassung des Bundesgerichtshofs hat das Oberlandesgericht München in der mit Nichtzulassungsbeschwerde angegriffenen Entscheidung überhöhte Anforderungen an die Substantiierungspflicht gestellt. Hierbei hat der Senat auf die in Arzthaftungsprozessen entwickelten Grundsätze zurückgegriffen und festgestellt, dass diese Grundsätze auch außerhalb des Arzthaftungsrechts in Fallgestaltungen Anwendung finden, in denen ein Erfolg versprechender Parteivortrag fachspezifische Fragen betrifft und besondere Sachkunde erfordert.

In Arzthaftungsprozessen kann von dem Patienten nämlich gerade nicht erwartet oder gefordert werden, dass dieser sich zur ordnungsgenmäßen Prozessführung medizinisches Fachwissen aneignet.[1] Für die Patientenseite ist somit Vortrag ausreichend, der die Vermutung gestattet, dass negative Folgen für den Patienten ihre Ursache in dem fehlerhaften Handeln der Gegenseite haben. Gleiches gilt für Einwendungen gegen ein gerichtliches Gutachten. Diese müssen ohne Unterstützung durch sachverständigen Rat oder eines Privatgutachtens möglich sein.[2]

Aus Sicht des Bundesgerichtshofes gelten die vorgenannten Grundsätze auch dann, wenn sich in einem Schadensersatzprozess wegen Produkthaftung medizinische Fragen stellen. Insoweit dürften weder an den klagebegründenden Sachvortrag noch an Einwendungen gegen ein Sachverständigengutachten hohe Anforderungen gestellt werden. So genügte aus Sicht des Bundesgerichtshofes im vorliegenden Fall ein einfaches, unbegründetes Attest als Einwand gegen das Gutachten des gerichtlich bestellten Sachverständigen.

Diese Übertragung der aus dem Arzthaftungsrecht anerkannten Grundsätze auf das Produkthaftungsrecht ist nicht frei von Spannungen. Denn haften Ärzte haften, etwa bei Beratungsfehlern, verschuldensabhängig. Demgeg enüber sieht das ProdHaftG eine Gefährdungshaftung der Hersteller vor – im Gegenzug trägt der Kläger nach § 1 Abs. 4 ProdHaftG die Beweislast für den Produktfehler, den eingetretenen Schaden und den Kausalzusammenhang. Bei einem Absenken der Substantiierungspflichten wird diese Beweislastverteilung erheblich in Frage gestellt und es letztlich dem Gericht auferlegt, die Klage durch die Einholung von Sachverständigengutachten zu begründen – und dies, wie hier, bereits durch Vorlage eines einfachen ärztlichen

1. BGH, Beschl. vom 12.03.2019 - VI ZR 278/18, VersR 2019, 1450 Rn. 8 mwN

2. BGH, Beschl. vom 08.06.2004 - VI ZR 199/03, NJW 2004, 2825, 2827.

Attestes. Dies liegt nahe am Ausforschungsbeweis und ist von der Risikoverteilung im Produkthaftungsrecht weit entfernt. Daher bleibt abzuwarten, wie die Instanzgerichte mit der neuen Entscheidung umgehen und ob der Bundesgerichtshof diese Rechtsprechung zukünftig auch auf Fallkonstellationen außerhalb des medizinischen Produkthaftungsbereichs ausweiten und damit die Beweislastverteilung im Produkthaftungsrecht weiter in Frage stellt.

Dr. Isabelle Kilian

Bindungswirkung einer gerichtlichen Entscheidung über die Zuständigkeit des Schiedsgerichts - OLG München (34. Zivilsenat), Beschluss vom 27.02.2020 - 34 Sch 15/17

Die Bindungswirkung einer gerichtlichen Entscheidung, die die Zuständigkeit eines Schiedsgerichts gemäß § 1040 Abs. 3 S. 2 ZPO bejaht, umfasst auch die Feststellung der objektiven Schiedsfähigkeit nach deutschem materiellen Recht gemäß § 1059 Abs. 2 S. 2 lit. a ZPO. Wird die Zuständigkeit des Schiedsgerichts und damit auch die Wirksamkeit der Schiedsklausel bejaht, ist das Gericht in einem späteren Verfahren über die Vollstreckbarkeit oder Aufhebung des Schiedsspruchs an diese Entscheidung gebunden.

Mit dem am 27 Februar 2020 erlassenen Beschluss entschied der 34. Zivilsenat des Oberlandesgerichts München über die Vollstreckbarkeit eines zwischen den Streitparteien ergangenen Schiedsspruchs. Der Antragsgegner beantragte die Vollstreckbarerklärung unter Aufhebung des Schiedsspruchs abzulehnen. Das Gericht gab den Anträgen der Antragstellerin, den Schiedsspruch für vollstreckbar zu erklären, vollumfänglich statt.

Die Antragstellerin und der Antragsgegner hatten einen Gesellschaftsvertrag mit der Vereinbarung einer freien Mitarbeit geschlossen sowie eine Schiedsabrede diesen Vertrag betreffend. Zur Beilegung einer darauffolgenden Streitigkeit aus dem Vertrag leitete die Antragstellerin (und damalige Schiedsklägerin) ein Schiedsverfahren mit Sitz in Aschaffenburg, Deutschland ein. Bereits vor dem Erlass des Schiedsspruchs brachte der Antragsgegner eine Rüge der Unzuständigkeit des Schiedsgerichts mit der Begründung vor, dass die Antragstellerin keine Vertragspartei der Schiedsvereinbarung sei. Nachdem das Schiedsgericht seine Zuständigkeit am 18. Juni 2015 bejaht hatte, stellte der Antragsgegner beim Oberlandesgericht München einen Antrag auf Aufhebung des ergangenen Zwischenentscheids und Feststellung der Unzuständigkeit des Schiedsgerichts gemäß § 1040 Abs. 3 S. 2 ZPO. Das Gericht wies den Antrag mit einem rechtskräftigen Beschluss vom 26. Januar 2016 zurück.

Das Schiedsgericht entschied die Streitigkeit zum Nachteil des Antragsgegners. Nach dem Schiedsspruch vom Oktober 2017 sollte der Antragsgegner EUR 40.000 an die Antragstellerin zahlen. Im darauffolgenden Verfahren zur Erklärung der Vollstreckbarkeit des Schiedsspruchs erklärte der Antragsgegner, dass der im Schiedsverfahren behandelte Gegenstand nach dem maßgeblichen deutschen Recht objektiv nicht schiedsfähig und der Schiedsspruch daher aufzuheben sei. Seiner Ansicht nach handelte es sich bei dem Rechtsverhältnis der Parteien um ein Arbeitsverhältnis, dass nach dem ArbGG der Schiedsgerichtsbarkeit entzogen ist. Dem hielt die Antragstellerin eine zwischen den Parteien ergangene Entscheidung des Senats zur Zuständigkeit des Schiedsgerichts entgegen.

Das Gericht entschied, dass die Bindungswirkung einer gerichtlichen Entscheidung über die Zuständigkeit des Schiedsgerichts nach § 1040 Abs. 3 S. 2 ZPO auch die Feststellung der Gültigkeit der Schiedsvereinbarung gemäß § 1040 Abs. 1 S. 1 ZPO und somit der objektiven Schiedsfähigkeit nach deutschem Recht gemäß § 1059 Abs. 2 Nr. 2 lit. a ZPO umfasst. Dementsprechend trat durch die vom Antragsgegner nicht vorgebrachten Einwände zur mangelnden Schiedsfähigkeit der Streitigkeit im vorigen Verfahren vor dem Senat Präklusion ein, indem ihrer Berücksichtigung die Bindungswirkung der Entscheidung vom 26. Januar 2016 entgegenstand. Ohne Belang ist insoweit, dass

im Vollstreckbarerklärungsverfahren gemäß § 1059 Abs. 2 Nr. 2 lit. a ZPO das Fehlen der objektiven Schiedsfähigkeit des vom Schiedsgericht entschiedenen Gegenstands von Amts wegen zu beachten ist. Die ergangene Entscheidung vom 26. Januar 2016 ist in materieller Rechtskraft erwachsen. Sie ist daher im Vollstreckbarerklärungsverfahren insoweit verbindlich, als im vorausgegangenen Verfahren sachlich über eine dann erhebliche Vorfrage entschieden worden ist, nämlich ob das Schiedsgericht zur Klärung der Streitigkeit zuständig ist.

Die Entscheidung des Oberlandesgerichts steht im Einklang mit einem älteren Beschluss des Bundesgerichtshofs vom 21. April 2016 (BGH, Beschluss v. 21.04.2016 – I ZB 7/15) und hebt erneut die Notwendigkeit hervor, im gerichtlichen Verfahren nach § 1040 Abs. 3 S. 1 ZPO auf alle Aspekte einzugehen, die auf die Zuständigkeit des Schiedsgerichts Einfluss haben können. Obwohl sich die Präklusion nicht auf solche Aufhebungsgründe erstreckt, die ein Gericht von Amts wegen zu prüfen hat, darf ein Gericht solche Gründe in einem späteren Aufhebungs- oder Vollstreckbarkeitsverfahren wegen der Rechtskraft der früheren Zuständigkeitsentscheidung nicht berücksichtigen. Praktisch bedeutet dies, dass die Parteien ihre sämtlichen Einwände gegen die Zuständigkeit des Schiedsgerichts bereits in dem Gerichtsverfahren über die Zuständigkeit des Schiedsgerichts möglichst frühzeitig vorzubringen haben.

Dr. Styliani Ampatzi, LL.M.

A fundamental error in a Qatar arbitration, and a lesson that is relevant to any arbitration

An Australian court recently declined to enforce a Qatari tribunal's award as a result of a failure to constitute the tribunal in strict accordance with the arbitration clause. In this article, we explore the court's judgment that affirms the primacy of the arbitral agreement and reiterates that local enforcement of international arbitral awards is a confined exercise, even in jurisdictions perceived to have a 'pro-enforcement' bias.

Background of the arbitration

The claimant, Energy City Qatar (**ECQ**), is a Qatari company and the respondent, Hub Street Equipment (**Hub**), is an Australian company. In 2010, Hub contracted with ECQ to supply and install goods in Doha. ECQ made an advance payment to Hub in the amount of US$820,322.16. However, ECQ subsequently decided not to proceed with the contract, and requested a refund of the advance payment. Hub did not repay the advance payment, and ceased communications with ECQ.

The contract contained an arbitration clause which included the following:

"An Arbitration Committee shall consist of three members, one member being appointed by each party within 45 days of one party receiving a written notice from the other party to start arbitration proceedings. The third member shall be mutually chosen by the first two members and shall chair the Arbitration Committee and issue the decision of the Arbitration Committee which shall be by a majority vote and shall be binding on both parties."

ECQ did not issue 45 days' notice to Hub "to start arbitration proceedings", pursuant to the contract. Rather than each party nominating a tribunal member, ECQ applied directly to the Qatari Courts, which, in turn, appointed the three tribunal members (one of which was nominated by ECQ). Although Hub was served with the arbitration proceedings, the arbitration process was conducted without the participation of Hub and an award was eventually rendered in ECQ's favour.

Enforcement proceedings

Proceedings were issued by ECQ in the Federal Court of Australia, on the basis that Hub is an Australian incorporated company with assets in that jurisdiction. The Court of First Instance granted enforcement of the award, holding that there would be no resultant unfairness as Hub had adequate opportunity to participate in the arbitration and had received actual notice of the proceedings and of constitution of the tribunal. Accordingly, judgment was entered in favour of ECQ together with costs of the proceeding.

On appeal, however, the Appeal Court overturned the first instance decision, holding that the award should not be enforced in Australia. The Appeal Court held that, as the arbitral tribunal was not constituted in accordance with the parties' arbitral agreement, it lacked requisite authority to determine the dispute and grant relief. In particular the Appeal Court stated that:

"…any exercise of jurisdiction of the Qatari Court to appoint arbitrators to the dispute of the parties rested on the parties' agreement, and since what they agreed was not followed the basis for the exercise of that jurisdiction was lacking; the failure goes to the very heart of the decision that ECQ would have this Court recognise."

As such, the Appeal Court held that there was little, if any, scope to exercise the residual discretion to enforce the award. On this basis, the Appeal Court set aside the first instance orders and declarations, ruling that the proceeding be dismissed.

The Appeal Court also considered whether, as a matter of discretion, the award could or should nevertheless be enforced. The Appeal Court held that the conduct of the arbitration in Arabic was, in isolation, a non-compliance which was sufficiently minor to justify the exercise of discretion to enforce the award. However, the formation of the tribunal by the Qatari Courts, in contravention of the arbitration agreement, was "*fundamental to the structural integrity of the arbitration*" and so did not justify the exercise of discretion to enforce the award.

Lessons learnt

The Australian Federal Court's decision illustrates the importance of strict compliance with the content of arbitration agreements, particularly in the regions where local courts may be prepared to take a flexible approach to arbitration procedure. The decision serves as a helpful reminder that, despite the courts in most jurisdictions that are signatories to the New York Convention being reluctant to refuse enforcement of arbitral awards, any non-compliance with an arbitration agreement runs the risk of creating difficulties in subsequent enforcement proceedings.

Laura Warren

Jonathan Parker

Sam Baldwin

Dubai reforms its arbitration centres, with immediate effect

On 20 September 2021, Decree No. (34) of Year 2021 Concerning the Dubai International Arbitration Centre (the "Decree") issued by the Government of Dubai came into force.

Shaken, not stirred, appears to be the preference for the sudden reform brought about by the Decree. The Decree was issued on 14 September 2021 and came into force just six days later, bringing about, overnight, significant changes to Dubai's legal landscape for the resolution of disputes. The changes made by the Decree came as a surprise to the arbitration and business communities.

The Decree abolishes with immediate effect the Emirates Maritime Arbitration Centre ("EMAC") and the Dubai International Financial Centre Arbitration Institute (the "DAI"). In so doing, the Decree has spawned concerns over the status of the DIFC-LCIA Arbitration Centre and EMAC, as well as arbitration under the DIFC-LCIA Arbitration Rules and EMAC Arbitration Rules.

The DIFC-LCIA Arbitration Centre is a concept established by agreement between the London Court of International Arbitration ("LCIA") and, in essence, the Government of Dubai with the DAI employing the centre's secretariat in charge of locally administrating arbitration cases subject to the DIFC-LCIA Arbitration Rules. The DAI also performs other administrative functions in connection with the administration of cases under the DIFC-LCIA Arbitration Rules.

The Decree establishes a single unified arbitration centre for Dubai named the Dubai International Arbitration Centre ("DIAC") with a structure that replaces the existing Dubai International Arbitration Centre as we know it.

Article 1 of the Decree provides that the new DIAC is a non-governmental centre with financial and administrative independence from the Dubai Government and others. Article 2 of the Decree provides that the new DIAC shall have its headquarters in the Emirate of Dubai and a branch in the Dubai International Financial Centre (the "DIFC").

The Decree transfers to the new DIAC the assets and employees of EMAC and of the DAI, as well as the financial allocations previously granted to the abolished centres by the Government of Dubai.

Article 9 of the Decree provides the new DIAC with six months from 20 September 2021 (until 20 March 2022) to give effect to the transition prescribed by the Decree.

The changes brought about by the Decree are especially of relevance to parties involved in arbitration under the EMAC Arbitration Rules and the DIFC-LCIA Arbitration Rules. The changes are also of relevance to businesses that have concluded transactions which include an agreement to resolve disputes under the DIFC-LCIA Arbitration Rules or EMAC Arbitration Rules.

It is estimated that 180 ongoing arbitration cases are currently administered under the DIFC-LCIA Arbitration Rules. Thousands of agreements provide for the resolution of disputes under the DIFC-LCIA Arbitration Rules, a practice which was trending towards becoming a staple of business transactions involving the Middle East.

Article 6(A) of the Decree provides that all agreements which have been concluded by 20 September 2021 providing for arbitration under the rules of one of the abolished centres shall be considered as valid and effective. Article 6(A) proposes that the new DIAC shall substitute the abolished centres in the administration of disputes under such agreements unless the parties agree otherwise.

With regard to the ongoing cases under the rules of one of the abolished centres, Article 6(B) of the Decree provides that arbitral tribunals constituted by 20 September 2021 shall continue to hear and determine all arbitration cases before them without interruption and under the same arbitration rules which currently apply to such arbitrations. Article 6(B) also proposes that the new DIAC supervise these cases.

Article 7 of the Decree provides that each of the Dubai Courts and the DIFC Courts shall continue to hear cases concerning arbitration awards and other measures relating to arbitration under the rules of one of the abolished centres.

The abolishment of a regional centre involving the LCIA is not unprecedented. LCIA supported arbitration centres in India and Mauritius were terminated in 2016 and 2018 respectively. In both cases, the LCIA continued to administer ongoing arbitration cases. The DIFC-LCIA Arbitration Rules are conducive to a similar outcome given that they ultimately provide for the critical aspects of arbitration case administration (for example the appointment of arbitrators) to be performed by the LCIA, and for less critical aspects to be performed under the LCIA's supervision.

For India and Mauritius, the LCIA also accepted to administer new arbitration cases arising out of agreements that had been concluded before the change was effected and referencing the rules of the terminated arbitration centres.

The examples of India and Mauritius offer some welcome guidance as to what businesses who have referenced the DIFC-LCIA Arbitration Rules in their agreements and parties involved in arbitration under the same rules might expect.

The six month transition period provided for in the Decree should allow for the institutions involved to shed more light on the transitional arrangements concerning the administration of arbitration under the DIFC-LCIA Arbitration Rules and EMAC Arbitration Rules. A statement released by the DAI on 20 September 2021 confirms that consultation is taking place between the LCIA and the Government of Dubai to seek to ensure the good management of existing and future cases.

In the meantime, parties involved in arbitration under the EMAC or DIFC-LCIA arbitration rules and businesses having referenced the EMAC Arbitration Rules or the DIFC-LCIA Arbitration Rules in their agreements would be well advised to take advice as to the legal implications resulting from the Decree.

Businesses who had adopted the DIFC-LCIA Arbitration Rules or EMAC Arbitration Rules as their model dispute resolution clause must immediately take legal advice on the adoption of a new model clause.

Dubai has emerged as one of the top 10 international arbitration hubs according to a study published in May 2021 by the School of International Arbitration at Queen Mary University of London (the "SIA"), a leading arbitration related institution.

Nassif BouMalhab

Maria Andraos

Insight: Clyde & Co

Dr. Henning Schaloske im Vorstand von ARIAS Deutschland

Seit dem 18. Oktober 2021 ist unser Partner Dr. Henning Schaloske Mitglied des Vorstands von ARIAS Deutschland. Die AIDA Reinsurance and Insurance Arbitration Societies (ARIAS) sind regionale Verbände der Internationalen Vereinigung für Versicherungsrecht (AIDA). Sie fördern die Nutzung der Schiedsgerichtsbarkeit als Mittel zur Beilegung von Versicherungsstreitigkeiten. So stellt ARIAS Deutschland unter anderem Schiedsordnungen bereit und zertifiziert Schiedsrichterinnen und Schiedsrichter.

Unterstützer des Willem C. Vis International Commercial Arbitration Moot

Im Oktober 2021 begann der Willem C. Vis International Commercial Arbitration Moot, der weltweit größte und renommierteste internationale Studierendenwettbewerb auf dem Gebiet der internationalen Handelsschiedsgerichtsbarkeit. Der englischsprachige Wettbewerb findet bereits zum 29. Mal statt und gibt den Studierenden die Gelegenheit, durch ein simuliertes Schiedsverfahren die faszinierende Welt der Schiedsgerichtsbarkeit kennenzulernen. Diese Erfahrung ist häufig prägend für die spätere berufliche Laufbahn vieler Teilnehmer*innen.

Wir finden das Engagement der Studierenden großartig und freuen uns, auch in diesem Jahr Vis Moot Teams finanziell und ideell zu unterstützen. Es freut uns, dass wir dieses Jahr mit 13 Teams mehr Teams unterstützen als in den vergangenen Jahren. Dies sind die Teams der Universitäten Bayreuth, Bielefeld, Bonn, Bremen, Düsseldorf, Freiburg, Hamburg, Köln, Leipzig, München, Münster und Passau sowie der Bucerius Law School.

Zum ersten Mal wurde dieses Jahr auch unser Förderungsprogramm durch eine Veranstaltung für die Coaches der Teams bereichert. So haben wir Anfang November die diesjährigen Coaches in unser Düsseldorfer Büro eingeladen, um unsere Erfahrungen aus den Bereichen Konfliktlösung, Teamführung und Feedbackkultur mit ihnen zu teilen. Des Weiteren konnte viele unserer Anwältinnen und Anwälte von ihren persönlichen Erfahrungen mit dem Vis Moot berichten. Es folgte ein intensiver Austausch mit den Coaches, der bei einem anschließenden Get-Together fortgeführt werden konnte.

Wir freuen uns schon auf unser nächstes Vis Moot-Event und den weiteren Austausch mit den Studierenden. Bis dahin wünschen wir allen Teams viel Spaß und Erfolg in der Schriftsatzphase.

We are delighted to introduce our international arbitration team in Germany, comprising more than 25 lawyers across our offices in Dusseldorf, Hamburg and Munich. Our arbitration team has significant experience in complex international and domestic arbitrations (ICC, LCIA, DIS, SIAC, SCC, AAA, LMAA, GMAA, ad hoc) across various industry sectors.

Besides commercial arbitrations, we advise investors on investment protection and represent them in investment arbitrations (ICSID, UNCITRAL and ad hoc) when their investments abroad are at stake. We support our clients in jurisdictional disputes, arbitrator challenges, setting-aside and enforcement of arbitral awards. The lawyers of our German arbitration team work closely with damage, forensic or technical experts in order to argue complex cases and to achieve the best possible outcome. We have extensive experience in oral advocacy before international tribunals. Further, our lawyers not only act as counsel in complex and high value disputes but also regularly sit as arbitrators themselves – making them better advocates. Our German arbitration team works closely with our European arbitration teams in London, Paris and Madrid as well as with our 50+ offices worldwide to provide our clients with dispute advice and representation on a global level.

If you would like to receive a copy of our Arbitration Germany brochure or have any questions, please get in touch with

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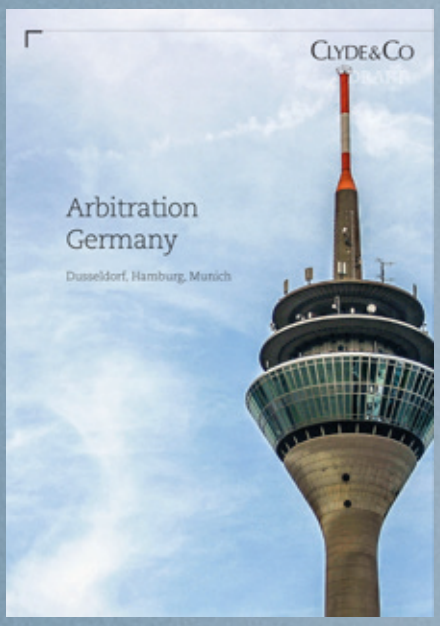
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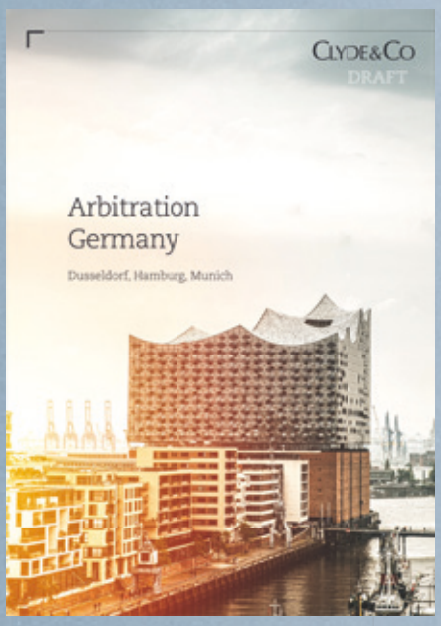
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