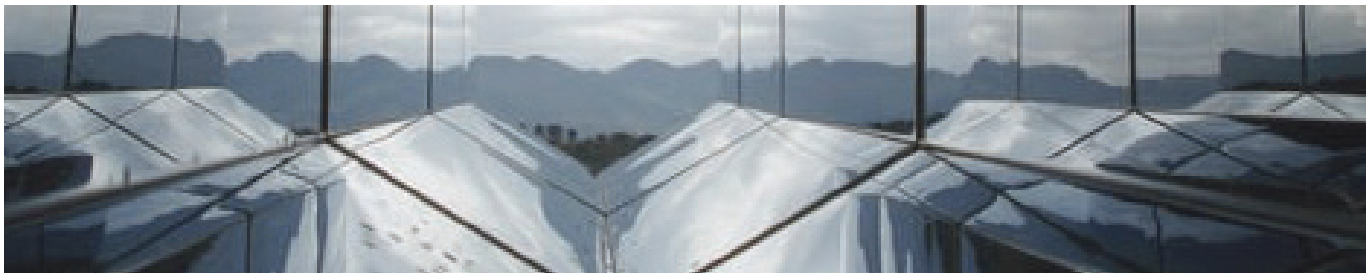
CLYDE&CO

Arbitration & Litigation

Quarterly Update 2/2021

Inhalt



Liebe Leserinnen und Leser,

mit unserer zweiten Ausgabe des Quarterly Updates freuen wir uns, Ihnen wieder aktuelle Trends und Entwicklungen im Bereich Arbitration & Litigation vorzustellen.

Im März fanden eine Reihe von Arbitration Events unter der Organisation und Mitwirkung von Georg Scherpf statt. Zunächst ist in diesem Zusammenhang das neue Interview Format von Clyde & Co „Arbitration Tea Time“ zu nennen. Der Startschuss fiel am 4. März mit einem Gespräch mit Prof. Dr. Jacomijn van Haersolte-van Hof (Director General des LCIA). Das Interview beleuchtete die derzeitigen Herausforderungen der institutionellen Schiedsgerichtsbarkeit. Die nächste Arbitration Tea Time findet bereits Ende Juni statt. Zu Gast ist dann Francesca Mazza, Generalsekretärin der DIS, die von Georg Scherpf interviewt wird. Eine weitere Veranstaltung mit dem Titel „The Klein-Klein of Climate Change Contracts“ fand im März im Rahmen der Hamburg International Arbitration Days zusammen mit The Chancery Lane Project, dem Arbitration Institute der Stockholm Chamber of Commerce und KPMG statt. Inhaltlich ging es um den Einfluss des Klimawandels auf Vertragsbeziehungen und die Auswirkungen auf die Handelsschiedsgerichtbarkeit.

Auch in personeller Hinsicht hat sich bei uns wieder viel getan: Wir freuen uns, seit April Christoph Pies im Team zu begrüßen. Christoph Pies ist von Heuking Kühn Lüer Wojtek zu uns gestoßen und verstärkt als erfahrener Prozessanwalt unsere Litigation & Arbitration Praxis. Sein Fokus liegt auf komplexen handels-, haftungs- und gesellschaftsrechtlichen Streitigkeiten und Schiedsverfahren.

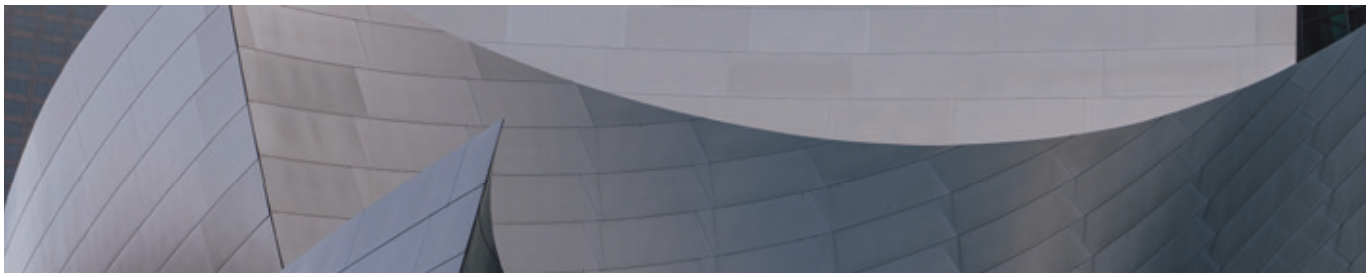
Darüber hinaus freuen wir uns, mit unserer neuen Broschüre Arbitration Germany das internationale Arbitration Team in Deutschland vorzustellen (für weitere Details siehe Seite 23).

Daneben haben wir prägnante Informationen zu folgenden Themen für Sie vorbereitet:

- Q&A with Christoph Pies, Clyde & Co
- Total Recall: Witness Evidence in International Arbitration (including ICC Report on Accuracy of Witness Evidence)
- New IBA Rules on Taking of Evidence
- Chancen und Risiken der Kostenlast in Schiedsverfahren – „How much is the fish?”
- BGH entscheidet bei Nichtzulassungsbeschwerde zu den Mindestanforderungen an eine Schiedsklausel
- Think before you arbitrate - practical considerations to make the most of arbitration
- Quebec Superior Court confirms Arbitrability of Insurance Coverage Disputes
- With a little help from my friends - court assistance in arbitration
- Incoterms 2020
- Climate change, governments and human rights
- Closing Arguments by Video Conference - The Show Must Go On
- Non-Resident Employment Visa Requirement for Arbitral Proceedings in Hong Kong Lifted in New Scheme
- The Klein-Klein of Climate Change Contracts – Event Report
- Renewables in Turkey – Realising Potential and Mitigating Risks – Event Report
- Just-In: Dutch Court orders Shell to reduce carbon emissions by 45%

Wir wünschen Ihnen eine interessante Lektüre und freuen uns über Fragen, Anregungen und Feedback. Schreiben Sie uns gerne dazu an **arbitration.germany@clydeco.com**.

Ihr Arbitration Team Germany



Dear readers

With the second issue of our Quarterly Update for the year 2021, we are pleased to once again present current trends and developments in the field of Arbitration & Litigation.

In March, a number of arbitration events took place under the organisation and participation of Georg Scherpf. First of all, the new interview format of Clyde & Co "Arbitration Tea Time" should be mentioned in this context. It kicked off on 4 March with an interview with Prof. Dr Jacomijn van Haersolte-van Hof (Director General of the LCIA). The interview shed light on the current challenges that institutional arbitration is now facing. The second Arbitration Tea Time is scheduled for end of June where Francesca Mazza. Secretary of General of the DIS, will be interviewed by Georg Scherpf. Another event, entitled "The Klein-Klein of Climate Change Contracts", took place in March as part of the Hamburg International Arbitration Days and was organised together with The Chancery Lane Project, the Arbitration Institute of the Stockholm Chamber of Commerce and KPMG. It was about the impact of climate change on contractual relationships and the respective implications for commercial arbitration.

A lot has happened also in terms of personnel additions: In April, we were very pleased to welcome Christoph Pies to our team. Christoph Pies joined us from Heuking Kühn Lüer Wojtek and strengthens our Litigation & Arbitration practice as an experienced litigator. His focus is on complex commercial, liability and corporate disputes as well as arbitration proceedings.

Finally, we are pleased to present our new brochure Arbitration Germany, which introduces the international arbitration team in Germany (for details please see page 23).

In this issue, we have prepared for you articles on the following topics:

- Q&A with Christoph Pies, Clyde & Co
- Total Recall: Witness Evidence in International Arbitration (including ICC Report on Accuracy of Witness Evidence)
- New IBA Rules on Taking of Evidence
- Chancen und Risiken der Kostenlast in Schiedsverfahren – „How much is the fish?"
- BGH entscheidet bei Nichtzulassungsbeschwerde zu den Mindestanforderungen an eine Schiedsklausel
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We hope you enjoy reading. Please feel free to contact us at **arbitration.germany@clydeco.com** with your questions, suggestions and feedback.

Sincerely yours

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Unser Team / Our Team

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Q&A with Christoph Pies, Clyde & Co

Christoph Pies co-leads our Dusseldorf litigation team, representing international and domestic clients in complex commercial, liability and corporate litigations and arbitrations. Christoph covers a wide array of sectors. His key areas of focus are disputes in the fields of international trade, infrastructure as well as shareholder disputes.

Could you please introduce yourself and your role at Clyde & Co in a few words?

In my new role as Litigation & Arbitration Counsel at Clyde & Co's Dusseldorf office, I advise and represent international and domestic clients in complex commercial, liability and corporate disputes. This covers a wide array of sectors and in particular disputes in the fields of international trade, infrastructure and shareholder disputes. I work closely with my colleagues from the other German offices in Hamburg and Munich as well as the international disputes teams, in particular London and Paris.

You say that corporate, liability and commercial disputes form your key area of focus and you have already worked on many cases in those fields of law. Do you have favorite cases?

I could name several aspects that describe the thrill a litigator experiences working in these fields of law. I like every case, because each one is different and a new challenge. Shareholder disputes and D&O liability cases can be emotionally more involving than others, especially when it gets personal or the client's economic existence is at stake. The same may apply to large compensatory damage claims, international product liability cases or insolvency-related disputes. In general, I enjoy covering a wide array of subjects that come up in commercial, liability and corporate disputes and ploughing my way into a new topic, you always learn something new in marginal areas.

You started your career as a M&A lawyer in a global American law firm. How does this help you in your work as a litigator?

Working in the M&A team of a big international law firm certainly gives you a good commercial understanding, discipline and structure, all characteristics a litigator or in general a lawyer should have. Many disputes arise out of contracts originally concluded between the parties. Therefore, as a litigator I profit from having drawn up clauses and contracts myself and have an understanding for the situation when a transaction was signed and closed. During my time as a M&A-lawyer I also had the chance to participate in many negotiations during major corporate transactions which I also benefit from as a litigator. It is something that should not be underrated: A litigator must also be a good negotiator.

What motivated you then to become a litigator?

The confrontation with opposing points of view, the dispute and its often fundamental importance for the parties involved, the strategic planning, the adrenaline rush before the deadline and oral hearing, and, last but not least, the deep work with the law.

In your opinion, how important is litigation for national and international companies compared to arbitration?

Very important. Many relevant lawsuits are not referred to arbitration courts through arbitration clauses and therefore end up before state courts. Of last year's outstanding proceedings, many were litigation proceedings, Diesel-Gate, Cum-Ex, Connected-Cars, only to name a few.

What are the trends in litigation in Germany and Europe in 2021?

These are naturally determined by the omnipresent Covid-19 issue. Currently, there is a veritable wave of lawsuits against insurers in the context of business interruption insurance. In addition, companies and their boards as well as insurers are engaged in insolvency-related disputes. Pandemic-related disruptions to supply chains are also giving rise to litigation. In Germany and Europe, it can also be observed that the litigation market is moving further towards mass litigation and litigation funding. Just think of capital investor class actions, Diesel-Gate or the Wirecard scandal.

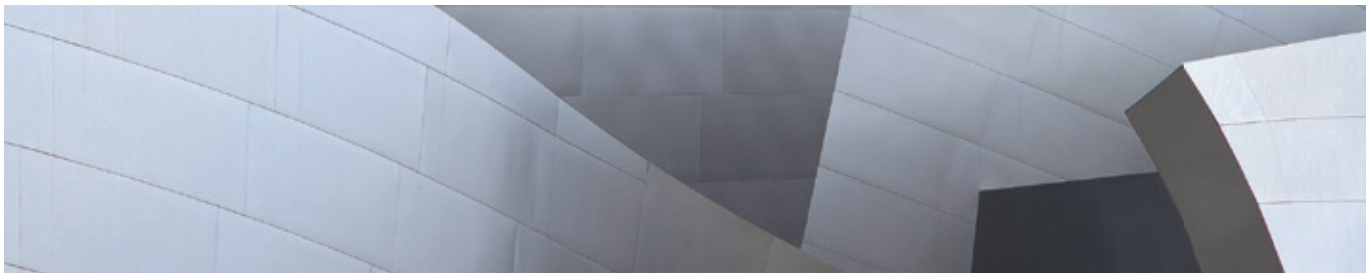
According to your experience, what characteristics and abilities does a good litigator need?

He must be convincing, assertive, flexible, an attentive listener and as already mentioned a good negotiator. He has to be able to put himself in the client's, the judge's and the other parties' shoes. Of course, excellent expertise and social skills are also not to be underestimated.

You studied at University of Muenster and completed your traineeship in Berlin. What was your first contact with litigation in Germany or internationally and when did you decide to pursue a career in this field?

During my studies I got many different insights in many different fields, in particular IP, antitrust, private equity and corporate law. My first deeper contact with litigation was during a legal traineeship at a renowned German Corporate boutique where I was involved in a large prospect liability case. Afterwards I worked as a trainee within the litigation practice of a law firm in Bangalore, India. When I then got involved in a large compensatory damage claim during my time as a M&A-lawyer and truly enjoyed it, I decided to pursue a career as a litigator.

Christoph Pies



Total Recall? – Witness Evidence in International Arbitration

The 1990s movie Total Recall tells the story of a construction worker (played by Arnold Schwarzenegger) who finds himself incapable of distinguishing between his real experiences and those that are the result of his memory implants. The title of the movie Total Recall has somewhat of a double meaning. The first meaning being the total (full) recollection of events (or experiences, i.e. the implants) and the second meaning being the recall of a faulty product. The recent ICC Commission Report on "The Accuracy of Fact Witness Memory in International Arbitration" (ICC-Report) does not go as far as to ask for a "total recall" of witness evidence in international arbitration. But it has extensively reviewed the distorting factors on witness evidence, outlined what can be done to preserve the accuracy of witness testimony and how to properly weigh the testimony considering these influences. This article summarises and comments on the main findings of the ICC Commission Report from a practitioner's perspective and raises some red flags for in-house and external counsel when it comes to the preparation of written testimony.

Witness Testimony in International Arbitration

Witness evidence in international arbitration can be used to fill gaps in the paper trail, to support or explain existing documents or simply to "set the scene" (i.e. provide background). The overall objective being that the tribunal gains some added insight to the facts of the case relevant for its deliberations and ultimate decision. Today, international arbitrations rarely come without witness testimony.

In contrast, civil law jurisdictions tend to give greater value to documentary evidence. Moreover, in many civil law jurisdictions, statements of a party to the proceedings (including its directors, managers) are not treated, without preconditions, as evidence as such (e.g. sec. 445 German Code of Civil Procedure, CCP). On the other hand, submitting witness testimony of a party, its directors, employees etc. is not only admissible but common in international arbitration.

It is also good practice in international arbitration that counsel interviews witnesses and assists in the preparation of the written statements to provide clear and concise testimony.

Counsel who are not prohibited from coaching witnesses for the hearing (e.g. in the US) often go to great length to prepare the witness for his or her day in court. English solicitors are, on the other hand, restricted to familiarising the witness with the arbitral process (familiarisation v. coaching)[1]. In civil law jurisdictions like Germany, the rules are less clear, safe that counsel may not purposively ask the witness to mislead the tribunal or court (Criminal liability). The lack of professional conduct rules in civil law jurisdictions relating to the interactions with witnesses is not surprising, given the preponderance of documentary evidence in civil procedure.

Considering the close interaction between counsel and witnesses in international arbitration and the possibility to submit witness statements of the parties to proceedings, witness evidence has in recent years been criticised as unreliable, polished by counsel and rarely relied upon by tribunals in their awards. Against this background, the ICC-Report sets out its finding and recommendations regarding the use of witness evidence in international arbitration.

[1] Stricter standards apply for solicitors in criminal proceedings R v Momodou [2005] EWCA Crim 177, [2005] 1 WLR 3442, [2005] 2 Cr App R 6. Caution must nevertheless also be applied in civil proceedings, see Ultraframe (UK (Ltd v Fielding [2006] EWHC 1638 (Ch).

ICC Report – The Accuracy of Fact Witness Memory and International Arbitration

The ICC-Report specifically looks at unintentional distortions and inaccuracies as opposed to deliberate efforts to mislead. To begin with, the ICC report makes clear, that although human memory is invariably imperfect, it does not mean that it is not valuable or even at times vital to the arbitral process.

The main distorting factor identified by the report is, principally, the exposure of a witness to Post Event Information (PEI). Such PEI can be anything from reviewing new documents or press reports to talking to colleagues, counsel or co-witnesses. The ICC report quotes existing psychological research which states that such "misinformation doesn't just alter details in our memory, it can add information to memory that was never there in the first place" (ICC-Report, section 2.5). This is particularly critical in international arbitration as there is often more than one witness testifying on the same or overlapping events. Exchanges between witnesses can easily lead to "memory conformity" effects. Studies suggest, as referenced in the ICC Report, that exposure to PEI can even overwrite existing factual memory. Also, when recalling past events, these recollections can be heavily biased by the perspective taken by the witness after those events, for example, in his or her employment for claimant or respondent. This perspective is "encoded" in the recollections. These biased recollections can even be intensified by putting questions to the witness with qualifying descriptors - "Do you frequently eat chocolate".

In order to determine whether these existing psychological findings (derived primarily from studies relating to criminal cases) equally apply in a commercial setting, the ICC Commission asked the psychologist Dr Kimberley Wade (University of Warwick) to conduct a witness memory experiment. The experiment showed that also in a commercial context, witness memory is as susceptible to similar distortions and influences as in the criminal context.

The report concludes, however, that simply reducing these distortions (i.e. interactions) with a witness may not be feasible, as these interactions are often necessary to discover the full facts of the case and efficiently prepare hearings. Besides the recollection of events, factual witness statements in international arbitration also serve the purpose of providing context, explain technical issues and/or documentary evidence. The ICC Task Force therefore opted for differentiated recommendations in which it proposed various possible steps to "preserve witness memory" and "reduce distortions". The recommendations are structured as follows:

In-House Counsel

In-house counsel are encouraged to establish procedures – within their department but also more generally within the company - for keeping contemporaneous written notes of events as they unfold. When it comes to an arbitration, in-house counsel should point out the importance of the witnesses' own recollection before bringing them into contact with external counsel. Witnesses should be interviewed one-by-one and not in a group. Setting-out a party line or trial strategy to the prospective witnesses must be avoided, witnesses discussing "endlessly" their testimony with other witnesses should be discouraged. The ICC-Report recommends preserving potential witness evidence early on, possibly even before it comes to a dispute, e.g. in complex construction projects.

External Counsel

Interview

Witness evidence should be collected as early as possible to avoid the loss of memory. At the outset of the witness interview, counsel should remind the witness that it is normal to have forgotten details and to differentiate between their own recollections and what they may have heard from others. It should also be made clear, that whatever the witness says in the interview, does not have any personal consequences.

During the interview, counsel should ask unbiased (and open) questions, that allow the witness to elaborate without any sense of direction. Counsel should avoid giving feedback to answers and if possible, avoid showing post event sources or documents. At the end of the interview, counsel should advise the witness not to discuss their testimony with co-witnesses or colleagues.

Assessing Information Provided by the Witness

Counsel should be mindful of the time that has lapsed between the actual events and time of the witness interview and test the accuracy of the statements by cross checking with other witnesses or documentary evidence. When assessing the information, preceding discussions of that witness with in-house counsel, co-witnesses or other colleagues should be considered (misinformation and memory conformity effect). The position of the witness and his or her responsibilities within the company should also be factored in (Stake in the evidence).

Preparation of the Witness Statement

It is recommended to provide written questions either before or after the interview to allow the witness to answer on their own terms. Giving the witness an opportunity to prepare their own drafts, if capable, considering language and drafting skills. Numerous discussions and drafts/revisions of the witness statement should be avoided. When drafting or polishing the written statement, counsel should preserve the witnesses "own voice". The witness should be discouraged from reading other witness statements.

Preparation for the Hearing

Counsel should carefully consider in how far witness preparation is permitted or indeed prohibited under the applicable professional conduct rules or the rules independently agreed or set in procedural orders. The ICC report also refers to the guidelines described above for the witness interview when conducting witness preparation for the hearing.

Identifying Distorting factors and Weighing Testimony

The ICC-Report encourages all players to educate themselves to better understand the distorting Factors on human memory, for example, such as the 'misinformation effect' or 'memory conformity'. Moreover, especially external counsel should train to conduct cognitive interviews (e.g. reinstating the witness mentally in past events, encourage active participation etc.). Training and education are also crucial to reduce wrong perceptions of witness memory.

Comment

In practice, distorting effects can particularly arise when witnesses are interviewed in the presence of in-house counsel, superiors or other witnesses. This can tempt the witness to try to fill gaps to seemingly "help" their company and employer by providing the best possible witness testimony. From a practitioner's point of view, it is essential to point out that filling gaps (even unconsciously) often leads to inconsistencies in witness statements which are then brought to light in a thorough cross-examination. Providing an honest testimony is the best assistance to external counsel and the in-house department. Ideally, witnesses can review and refer to their written contemporaneous notes, emails or memos to minimise distortions and allow counsel also to access the veracity of the information provided. Caution should also be exercised when providing fact witnesses with the parties' submissions or excerpts of those submissions. In practice, witnesses often want to know what their company is arguing in the case and get into the details. The exposure to this information should be kept to a minimum.

It is equally important to interview witnesses with an open mind and conscious of the potentially distorting factors. Witness interviews should be conducted by experienced lawyers and not "outsourced" to junior associates, who may be eager to obtain "advantageous statements".

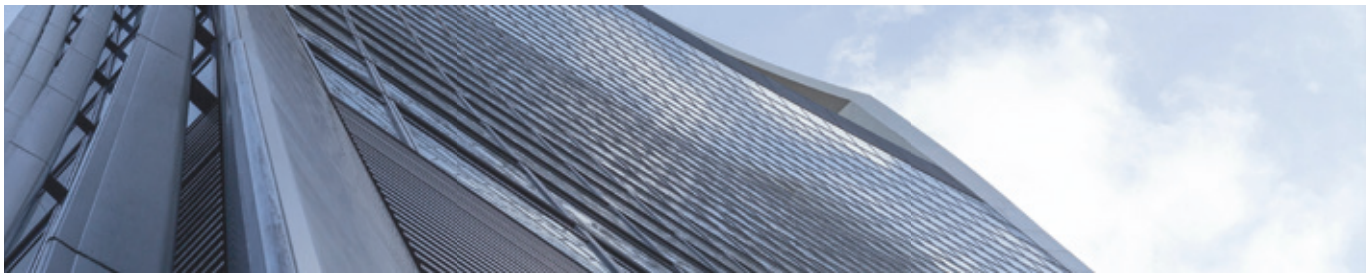
Providing written questions before the interview has proven helpful in practice, allowing the witness to answer the question on their own terms. Especially in complex technical arbitrations it is not always possible,

as recommended by the ICC-Report, to avoid showing the witness documents or indeed to liaise with co-witnesses. Overly polished written statements and overly prepared witnesses, where permitted, often harm the credibility of the witness. In practice, it is important to convey to "keen witnesses" that they should only provide their recollections and not attempt to help their employer by filling gaps and reading up on past events.

The ICC-Report provides welcome guidance and encourages all stakeholders to educate themselves about distorting factors and witness memory more generally. Distorting factors harm the arbitral process and it is in everyone's interest to preserve witness testimony and minimise distortions. The ICC-Report has also addressed common misperceptions about witness memory, which nicely illustrate the need for education and training. I leave you with FN 24 of the ICC-Report:

"'[…] research suggests that witnesses who include a high volume of peripheral detail in their memory reports are perceived as more credible than witnesses who provide few peripheral details (e.g. Wells, Leippe, 1981). […] Of course, such trivial and peripheral detail in a witness' testimony tells us little about how accurate their accounts really are. But this trivial information is persuasive, and we all have a tendency to think 'people who recall trivial details have a really good memory'. Training would help all participants have a better appreciation of their own biases and perceptions with respect to a witness' memory." [Emphasis added]

Georg Scherpf



2020 Revision of the IBA Rules on the Taking of Evidence in International Arbitration

In international arbitration, the IBA Rules on the Taking of Evidence in International Arbitration ("IBA Rules") are widely used to regulate evidentiary issues. On 17 February 2021, the International Bar Association ("IBA") released its revised Rules on the Taking of Evidence in International Arbitration to further clarify certain aspects and to react to the rapidly increasing reliance on technology in international arbitration practice. The revised Rules were meant to replace the previous 2010 edition.

The IBA Rules on the Taking of Evidence

Determining the procedures in an arbitration is a key issue that the parties, their counsel and the tribunal must face. While the chosen institutional and ad hoc procedural rules generally provide the framework for the arbitration proceedings and usually regulate issues like the constitution of the arbitral tribunal, the appointment of arbitrators and their challenges as well as the costs, this is not the case with respect to the taking of evidence. Questions like how the evidence should be gathered and presented in an arbitration remain to be answered by the parties and/or the tribunal since there is no uniform practice regarding these issues.

The IBA tried to cover the regulatory gap by introducing the IBA Rules in 1999. The main idea was to minimize the differences and find a balance between "common law" and "civil law", particularly relating to evidentiary matters. To achieve this, the IBA Rules attempted to codify the international practice that already existed and had elements from both the civil law and the common law jurisdictions. The initiative proved to be successful. Since their introduction in 1999, the IBA Rules have become increasingly important and are commonly adopted as default guidelines in both international commercial and investment arbitration proceedings.

The success of the IBA Rules led to the introduction of other sets of rules that also aim to regulate the taking of evidence in international arbitration. In this context, worth mentioning are the Rules on the Efficient Conduct of Proceedings in International Arbitration (Prague Rules) of 2019. The Prague Rules were promoted as an alternative to the IBA Rules suitable to accommodate the needs of civil law jurisdictions with all its peculiarities.

The changes

Having been revised for the first time on 29 May 2010, the 2020 Revision introduced the third edition of the Rules. The 2020 IBA Rules are a product of the need to provide further clarification and to acknowledge new practices that were, in the meantime, established in arbitration such as the extensive use of technology and its accompanying challenges. Unless agreed otherwise, in all arbitrations after 17 December 2020 in which the parties agree to apply the IBA Rules, the 2020 edition will now be applicable.

The newly released edition contains mostly minor changes. This is already evidenced by the official redlined comparison published by the IBA. Although rather modest, some of these changes are potentially significant. The key updates in the IBA Rules can be summarised as follows:

– **Consultation on issues of cybersecurity and data protection** (article 2): Pursuant to article 2 of the Rules, the Arbitral Tribunal shall consult the Parties at the earliest appropriate time in the proceedings and invite them to consult each other with a view to agreeing on an efficient, economical and fair process for the taking of evidence. The consultation on evidentiary issues may address the scope, timing and manner of the taking of evidence, including now, inter alia, the treatment of any issues of cybersecurity and data protection to the extent applicable. (Article 2.2(e)). The addition means to point out how important it is to address information security and data protection issues. In particular, the reference to data protection should be considered in conjunction with the European Union's General Data Protection Regulation ("GDPR")

- **Documents** (article 3): Some of the most significant changes contained in the 2020 revisions relate to the taking of evidence by way of Documents regulated in article 3 of the Rules. The changes are, however, rather of a clarifying nature:
  - Within the time ordered by the Arbitral Tribunal, each Party shall submit to the Tribunal and to the other Parties all Documents available to it on which it relies, including public Documents and those in the public domain, except for any Documents that have already been submitted by another Party. Within the time ordered by the Arbitral Tribunal, any Party may submit to the Arbitral Tribunal and to the other Parties a Request to Produce. Pursuant to article 3 para 5, if the Party to whom the Request to Produce is addressed has an objection to some or all of the Documents requested, it shall state the objection in writing to the Arbitral Tribunal and the other Parties within the time ordered by the Arbitral Tribunal. If so directed by the Arbitral Tribunal, and within the time so ordered, the requesting party may respond to the objection. The 2020 IBA Rules, therefore, clarify that the party who has requested the production of documents has the right to respond to an objection of the opposing party provided that the Arbitral Tribunal allows it. With this, the IBA Rules codify an already commonly established practice of arbitral tribunals allowing parties to respond to the opposing party's objections to document production requests
  - In accordance with article 3 para 7, either Party may, within the time ordered by the Arbitral Tribunal, request the Arbitral Tribunal to rule on the objection. The Arbitral Tribunal shall then, in timely fashion, consider the Request to Produce, the objection and any response thereto. In contrast to the 2010 edition, the IBA Rules no longer require the Tribunal to consult with the Parties when deciding on the Request to Produce. This change also reflects the common practice, as Tribunals often rule on such requests without holding an oral hearing
  - Documents to be produced in response to a Request to Produce need not be translated, while Documents in a language other than the language of the arbitration that are submitted to the Arbitral Tribunal shall be accompanied by translations marked as such (article 3 para 12 lit. d and e). With this a distinction is made: While foreign-language Documents submitted to the Arbitral Tribunal are required to be translated, Documents to be produced to another Party in response to a Request to Produce are not required to be translated. The provision is in accordance with the common practice in arbitration. Only the Documents that form part of the evidentiary record need to be translated. In light of this, it is also common for the parties to reach agreements regarding translations in order to keep the respective costs under control and make sure that they incur only where necessary
- **Witnesses of fact** (Article 4) **and Party appointed Experts** (article 5): If Witness Statements and/or Expert Reports are submitted, any Party may, within the time ordered by the Arbitral Tribunal, submit to the Arbitral Tribunal and to the other Parties revised or additional Witness Statements and/or, respectively, Expert Reports, including statements from persons not previously named as witnesses and/or identified as Party-Appointed Experts, so long as any such revisions or additions respond only to: (a) matters contained in another Party's Witness Statements, Expert Reports or other submissions that have not been previously presented in the arbitration.; or (b) new factual developments that could not have been addressed in a previous Witness Statement and/or a previous Expert Report, accordingly. With the revised provisions in article 4 para 6 and article 5 para 3, the IBA Rules allow the Parties to submit second round Witness Statements and/or Expert Reports to cover new factual developments that could not have been addressed in a previous Witness Statement or a previous Expert Report. In practice, the relevant provisions were usually interpreted rather broadly which, in some case, was the source of further dispute. The update aims to clarify the cases in which the submission of an additional Witness Statement or Expert Report is justified and thus permissible

– **Tribunal-Appointed Experts** (article 6): While the 2020 Revision leaves article 6 of the IBA Rules for the larger part unchanged, one modest but worthy of mention update is to be found in article 6 para 3 and concerns the scope of authority of the Tribunal-Appointed Expert to request information relevant to the case from the Parties. Pursuant to the previous edition of 2010, *"the authority of a Tribunal-Appointed Expert to request such information or access shall be the same as the authority of the Arbitral Tribunal"*. In the 2020 IBA Rules, the above passage was omitted. The update aims to ensure that the language in article 6 leads to no misunderstanding and make clear that there is no equivalence of authority between the Tribunal-Appointed Expert and the Arbitral Tribunal. The Tribunal has the exclusive authority to resolve disagreements between a Party and the Tribunal-Appointed Expert in relation to the Expert's requests for information or access
– **Remote Evidentiary Hearings** (article 8): The 2020 IBA Rules are now regulating the Remote Hearings as defined in the Preamble: *"Remote Hearing"* means a hearing conducted, for the entire hearing or parts thereof, or only with respect to certain participants, using teleconference, videoconference or other communication technology by which persons in more than one location simultaneously participate.

  Article 8 para 2 confirms that the Tribunal may, at the request of a Party or on its own motion, after consultation with the Parties, order that the Evidentiary Hearing as defined above be conducted as a Remote Hearing. In that event, the Arbitral Tribunal shall consult with the Parties with a view to establishing a Remote Hearing protocol to conduct the Remote Hearing efficiently, fairly and, to the extent possible, without unintended interruptions. The protocol may address: (a) the technology to be used; (b) advance testing of the technology or training in use of the technology; (c) the starting and ending times considering, in particular, the time zones in which participants will be located; (d) how Documents may be placed before a witness or the Arbitral Tribunal; and (e) measures to ensure that witnesses giving oral testimony are not improperly influenced or distracted.

  The update can be seen as a direct consequence of the COVID-19 pandemic that increased the interest of many users of international arbitration (and of the IBA Rules) in the Remote Hearings.

  As it is still disputed whether the Parties can be subjected to a Remote Hearing at the Tribunal's order and against their will, it is advisable, for the time being, that they expressly agree that a Remote Hearing is only possible with their consent

– **Admissibility and Assessment of Evidence** (article 9): Pursuant to the newly introduced provision in article 9 para 3, the Arbitral Tribunal may, at the request of a Party or on its own motion, exclude evidence obtained illegally. The 2020 IBA Rules do not specify what constitutes *"evidence obtained illegally"*. For the respective determination, the applicable law is therefore decisive

Conclusion

The new IBA Rules do not include ground-breaking changes. Nonetheless, they provide for more clarity and efficiency in the taking of evidence in international arbitration. While some scholars argue that the 2020 IBA Rules represent a missed opportunity to further clarify the provisions relating to the Admissibility and Assessment of Evidence, the codification of established practice in arbitration is, in any case, welcome. Many Arbitral Tribunals and Parties choose to consult the IBA Rules merely as guidelines for the evidence procedure and not to employ them as binding rules. In light thereof, further adjustment of the Rules to accommodate the specific needs of each case remain possible, while the IBA Rules simply reflect and codify the established prevailing practice in international arbitration.

Dr. Styliani Ampatzi, LL.M.

„How much is the fish?" Die Kostenlast in Schiedsverfahren

I. Einführung

Geld regiert die Welt – insbesondere bei Rechtsstreitigkeiten. Die Kostenlast, die Parteien im Rahmen eines Schiedsverfahrens trifft, kann erheblich sein. Daher stellt sich die Frage, wie Parteien das Risiko der Kostenlast beeinflussen können.

Die Kosten des Schiedsverfahrens setzen sich aus Verfahrensgebühr, Schiedsrichtervergütung und Auslagen (insbesondere Anwalts- und Sachverständigenkosten) zusammen. Ein gewichtiger Kostenunterschied zum ordentlichen Gerichtsverfahren ist die gängige Berechnung der Anwaltskosten anhand eines Stundensatzes anstelle des streitwertabhängigen Rechtsanwaltsvergütungsgesetzes.[1] Das Schiedsverfahren kann für die unterliegende Partei daher wesentlich teurer und für die obsiegende Partei deutlich günstiger werden. Die drohende Erstattung gegnerischen Anwaltskosten und Verfahrensgebühren hängt wie ein Damoklesschwert über den Parteien. Das Schiedsverfahren bietet jedoch Möglichkeiten, auf die Verteilung der Kosten Einfluss zu nehmen und birgt somit Chancen aber auch Risiken.

II. Die Kostenentscheidung des Schiedsgerichts

Vereinbaren die Parteien nichts Abweichendes und legt die von ihnen gewählte Schiedsordnung keine ausdrückliche Kostenregelung fest, steht die Kostenentscheidung nach deutschem Recht gemäß § 1057 Abs. 1 S. 2 ZPO im Ermessen des Schiedsgerichts. Dieses entscheidet, welche *„notwendigen"* Kosten von welcher Partei zu tragen sind.

„Notwendig" sind Kosten, die eine verständige Schiedspartei in der konkreten prozessualen Situation als sachdienlich ansehen durfte, inklusive solcher Kosten, die zur erfolgreichen Verteidigung zwingend und geeignet erscheinen. Unter mehreren vergleichbaren Maßnahmen ist dabei nur die kostengünstigere *„notwendig"*.[2]

Die Frage nach der Erstattungsfähigkeit der Kosten von UnternehmensjuristInnen verdeutlicht die unklaren Grenzen der „Notwendigkeit" von Kosten. Zwar vermag ein Syndikus die Kosten für externe Prozessbevollmächtigte zu verringern, gleichzeitig handelt es sich dabei regelmäßig um unabhängig von dem Schiedsverfahren anfallende Kosten (Sowieso-Kosten).[3]

Das Schiedsgericht entscheidet nach freiem Ermessen; es ist nicht an die staatliche Kostenregelung des § 91 ZPO gebunden.[4] Es kann somit selbst wählen, nach welchen Regeln es die Kosten verteilt. Dabei kann das Schiedsgericht sich insbesondere an den folgenden verbreiteten Kostenregelungen orientieren:

Nach der English Rule („costs follow the event") muss die unterliegende Partei die Kosten der obsiegenden Partei erstatten (Anwendungsbeispiel: Art. 42(1) der UNCITRAL Arbitration Rules 2013). Die unterliegende Partei soll dafür bestraft werden, die obsiegende Partei zu einem Schiedsverfahren gezwungen zu haben.[5] So sollen grund- und aussichtslose Klagen vermieden werden.[6] Daneben gibt es den Issue-Based Approach, bei dem die Kosten proportional zum Erfolg der einzelnen Streitpunkte verteilt werden (Anwendungsbeispiel: Art. 28(4) der LCIA Arbitration Rules 2020).[7]

Bei der American Rule trägt hingegen jede Partei ihre eigenen Kosten, nur die Verfahrenskosten werden verteilt.[8] Für diese Regelung spricht das grundlegende Recht auf Verfolgung eines möglichen Anspruchs. Parteien sollten nicht aufgrund der Sorge vor einer erheblichen Kostenlast von der Verfolgung eines Anspruchs abgehalten werden.

Ein eindeutiger Trend zu einem dieser Kostenmodelle ist nicht zu erkennen. Ein Blick in die Praxis verrät dennoch, dass die Kostenverteilung häufig mit dem Erfolg einer

[1] Ahrens/Erdmann, Die Erstattung von Zeithonoraren im Schiedsgerichtsverfahren, NJW 2020, 3142 Rn. 3; Wilske/Markert, in: BeckOK ZPO, 40. Auflage (01.03.2021), § 1057 Rn. 6; Saenger, in: Zivilprozessordnung, 8. Auflage 2019, § 1057 Rn. 12, OLG München, Beschluss vom 04.07.2016 – Az. 34 Sch 29/15, SchiedsVZ 2017, 40 Rn. 40.
[2] BGH, Beschluss vom 11.11.2003 – Az. VI ZB 41/03, NJW-RR 2004, 430 Rn. 10.
[3] Wilske/Markert, in: BeckOK ZPO, 40. Auflage (01.03.2021), § 1057 ZPO Rn. 5.
[4] Voit, in: Musielak/Voit, ZPO, 18. Auflage 2021, § 1057 Rn. 3.
[5] Bartsch, Third-Party Funding – A New Player in the Field of Cost Allocation, SchiedsVZ 2021, 12, 14.
[6] Fischer/Peter, Costs Follow Conduct – A Musical Altercation, Kluwer Arbitration Blog, 26.10.2017.
[7] Bartsch, Third-Party Funding – A New Player in the Field of Cost Allocation, SchiedsVZ 2021, 12, 14.
[8] Bartsch, Third-Party Funding – A New Player in the Field of Cost Allocation, SchiedsVZ 2021, 12, 14.

Partei verbunden ist[9] und somit letztlich das in § 91 ZPO verankerte und auch nach der English Rule praktizierte Unterliegenprinzips als Grundlage dient.[10]

1. Chancen

Ein Vorteil der freien Ermessensentscheidung des Schiedsgerichts liegt insbesondere in der dadurch möglichen Einzelfallbetrachtung. Das Schiedsgericht kann – abgesehen vom Ausgang in der Hauptsache – weitere, ihm relevant erscheinende Umstände berücksichtigen. Zunächst kann eine Partei, die das Verfahren zügig und kosteneffizient betrieben hat, durch eine geringere Kostenlast belohnt werden. Fällt eine Partei hingegen durch sogenannte „Guerilla-Taktiken" auf, also verzögerndes, unangemessenes oder sonst störendes Verhalten, kann eine Sanktionierung dieser Taktik durch Auferlegung von Kosten erfolgen.[11] Daneben können Ethikverstöße der Partei(-vertreter) innerhalb der Kostenentscheidung berücksichtigt werden[12] und so insgesamt zu einem zügigen und fairen Verfahren beitragen. Nicht zuletzt trägt der Ermessensspielraum des Schiedsgerichts dazu bei, den Kostenregelungen unterschiedlicher Jurisdiktionen Rechnung zu tragen.

2. Risiken

Ein Risiko der Ermessensentscheidung ist die Unvorhersehbarkeit der schiedsrichterlichen Kostenentscheidung. Es ist zu befürchten, dass das Schiedsgericht Kosten ohne Beachtung besonderer Faktoren im Einzelfall – wie beispielsweise eine unangemessen hohe Honorarvereinbarung von Sachverständigen oder Prozessbevollmächtigten – der anderen Partei auferlegt. Zudem ist nicht auszuschließen, dass aufgrund einer überzogenen Einzelfallbetrachtung die obsiegende Partei Kosten zu tragen hat, die durch ein wesentliches, aber erfolgloses Argument oder anderweitige Kosten, beispielsweise jene von UnternehmensjuristInnen, auf die andere Partei abgewälzt werden. Insbesondere diese Problematik wird in der Praxis häufig durch Ausschluss der Kosten[13] oder Begrenzung der Stundensatzhöhe für UnternehmensjuristInnen gelöst. Besonders überraschend kann das Vorgehen mancher Gerichte sein, bei der Kostenverteilung auch vorerst vertrauliche außergerichtliche Vergleichsvorschläge zu berücksichtigen, die von einer Partei im Laufe des Verfahrens unterbreitet aber abgelehnt wurden. Stellt sich später heraus, dass das gesamte Verfahren durch die Annahme eines zumutbaren Vergleichsvorschlags hätte vermieden oder verkürzt werden können, kann die ablehnende Partei mit einem negativen Kostenzuspruch unter Bezugnahme auf den unterbreiteten Vergleich bestraft werden. Sogenannte „Calderbank-Offers"[14] sollen einen Wettlauf zur Vernunft initiieren und Parteien gegenseitig dazu bewegen, Vergleichsvorschläge, die das Prozessrisiko möglichst realistisch wiedergeben, zu unterbreiten.

III. Praktische Aspekte und Möglichkeiten der Einflussnahme

Um sich nicht der unvorhersehbaren Kostenentscheidung des Schiedsgerichts auszusetzen, können die Parteien die Kostenlast selbstständig verteilen. Zu diesem Zwecke sollten sie sich schon vor Einleitung eines Schiedsverfahrens über die Kostenlast und die Einflussmöglichkeiten Gedanken machen.

Dafür können Parteien dem Schiedsgericht die Ermächtigung zur Kostenentscheidung in der Schiedsvereinbarung oder – nach Einleitung des Schiedsverfahrens – in einer Verfahrensvereinbarung entziehen. Im Rahmen der Schiedsvereinbarung machen Parteien sich selten Gedanken über die spätere Kostenlast eines Schiedsverfahrens. Jedoch gewährleistet auch die spätere Verfahrensvereinbarung eine angemessene Kostenverteilung, da den Parteien zu diesem Zeitpunkt die Rechtsauffassung des Schiedsgerichts nicht bekannt ist. Ein Formerfordernis besteht nicht.[15] Die Kostenabsprache sollte jedoch stets das Verfahrensrisiko berücksichtigen. Die Gewissheit zu Obsiegen stellt dabei Chance und Risiko zugleich dar.

[9]Bartsch, Third-Party Funding – A New Player in the Field of Cost Allocation, SchiedsVZ 2021, 12, 14; Lew/Mistelis/Kröll, Comparative International Commercial Arbitration, 2. Auflage 2003, 654.
[10]Voit, in: Musielak/Voit, ZPO, 18. Auflage 2021, § 1057 Rn. 3.
[11]Münch, in: Münchener Kommentar zur ZPO, 5. Auflage 2017, § 1057 Rn. 14.
[12]Schima/Sesser, Die von Parteivertretern in internationalen Schiedsverfahren zu beachtenden Ethikstandards, SchiedsVZ 2016, 61, 62.
[13]Wilske/Markert, in: BeckOK ZPO, 40. Auflage (01.03.2021), § 1057 Rn. 5.2. 2021, 12, 14;
[14]Zurückgehend auf den englischen Fall Calderbank v. Calderbank [1975] 3 All ER 333 (EWCA).
[15]Voit, in: Musielak/Voit, ZPO, 18. Auflage 2021, § 1057 Rn. 2.

Statistiken der ICC zufolge machen die Kosten der Parteien 82 % der Gesamtkosten des Schiedsverfahrens aus.[16] Diese Kosten sind sehr variabel und im Gegensatz zu den Verfahrenskosten nur bedingt planbar. Die Wahl der Schiedsinstitution bietet daher eine weitere Möglichkeit, die Verfahrenskosten des Schiedsverfahrens zu senken. Das Einsparpotential ist laut Statistiken der ICC nicht ganz unbedeutend. So stellen zwar die administrativen Kosten der Institution nur etwa 2 % der Gesamtkosten dar, gemeinsam mit den Kosten des Schiedsgerichts (ungefähr 16 % der Gesamtkosten) belaufen sie sich insgesamt doch auf knapp 20 % der Kosten des durchschnittlichen Schiedsverfahrens.[17]

Wie sehr Kosten durch die Wahl der Schiedsinstitution gesenkt werden können, zeigt eine beispielhafte Berechnung: Ein Schiedsverfahren mit drei Schiedsrichtern und einem Streitwert von EUR 500.000 kostet beispielsweise bei der ICC rund EUR 115.328, bei der SCAI EUR 87.079, bei der VIAC EUR 67.875 und bei der DIS nur EUR 46.585.[18] Mithin können sich die Kosten für die Schiedsinstitution und die Schiedsrichter je nach Wahl mehr als verdoppeln.

Schließlich kann das Risiko der Kostenlast auch an Prozessfinanzierer abgegeben werden. Diese übernehmen Teile oder sogar die gesamten Kosten des Schiedsverfahrens und erhalten im Gegenzug bei Obsiegen einen Anteil am zugesprochenen Anspruch. Im Falle des Unterliegens geht der Prozessfinanzierer hingegen leer aus und kann sich die eigenen Kosten nicht erstatten lassen.[19] Ein Verfahren ist für Prozessfinanzierer voraussichtlich nur bei überdurchschnittlich guten Gewinnaussichten attraktiv.

IV. Fazit

Zusammenfassend lässt sich festhalten, dass die flexible Kostenverteilung in Schiedsverfahren die Chance bietet, die Kosten des Verfahrens anhand der Interessen der Parteien und abweichend von ordentlichen Gerichtsverfahren zu verteilen. Eine Kostenentscheidung durch das Schiedsgericht ist für die Parteien bis zuletzt nicht vorhersehbar. Dies bietet wiederum den Anreiz, unangemessene Verfahrensverzögerung zu unterlassen. So werden kosteneffiziente und faire Schiedsverfahren gewährleistet.

Allerdings können die Parteien die Kostenverteilung vorab selbst festlegen und somit ihre Kosten vorausschauend planen und für Rechtssicherheit – jedenfalls hinsichtlich des Kostenrisikos – sorgen.

Also – how much is the fish? Es kommt darauf an.

Yesra-Cecile Pauly

Sita Rau

[16]Techniques for Controlling Time and Costs in Arbitration, ICC Publication 843, Introduction.
[17]Techniques for Controlling Time and Costs in Arbitration, ICC Publication 843, Introduction.
[18]Gebührenrechner der Institutionen, abrufbar unter: https://iccwbo.org/dispute-resolution-services/arbitration/costs-and-payments/cost-calculator/, https://www.swissarbitration.org/Arbitration/Cost-of-Arbitration; https://www.viac.eu/en/arbitration/cost-calculator, https://www.disarb.org/werkzeuge-und-tools/gebuehrenrechner.
[19]Bartsch, Third-Party Funding – A New Player in the Field of Cost Allocation, SchiedsVZ 2021, 12, 13.

Bundesgerichtshof entscheidet bei Rechtsbeschwerde zu den Mindestanforderungen an eine Schiedsklausel (BGH, Beschluss vom 06.02.2020 – I ZB 44/19)

Die Frage, ob die Parteien eine wirksame Schiedsvereinbarung getroffen haben, wenn ein gesonderter Schiedsvertrag geschlossen werden sollte, dies aber tatsächlich unterblieben ist, bleibt eine Frage des Einzelfalls, die es durch Auslegung gemäß §§ 133, 157 BGB unter Berücksichtigung des § 154 Abs. 1 Satz 1 BGB zu ermitteln gilt.

Schiedsklauseln in Gesellschaftsverträgen erfreuen sich nach wie vor großer Beliebtheit. Sie gewährleisten, dass Streitigkeiten zwischen den Gesellschaftern oder zwischen der Gesellschaft und den Gesellschaftern außerhalb des Rampenlichts des Gerichtssaals gelöst werden können.

Eine Schiedsvereinbarung kann gemäß § 1029 Abs. 2 ZPO in Form einer selbständigen Vereinbarung (Schiedsabrede) oder in Form einer Klausel in einem Vertrag (Schiedsklausel) geschlossen werden. Als zwingenden Mindestinhalt muss die Vereinbarung lediglich die Entscheidung eines Rechtsstreits unter Ausschluss des staatlichen Rechtsweges durch Schiedsrichter vorgeben.

In diesem Zusammenhang hat sich der Bundesgerichtshof (I. Zivilsenat) mit der Frage beschäftigt, ob Parteien eine wirksame Schiedsvereinbarung getroffen haben, wenn ein gesonderter Schiedsvertrag geschlossen werden sollte, dies aber tatsächlich unterblieben ist (BGH, Beschluss vom 06.02.2020 – I ZB 44/19, BeckRS 2020, 3068). In dem der Entscheidung zugrundliegenden Sachverhalt stritten die Parteien um die Wirksamkeit einer Schiedsklausel in einem Gesellschaftsvertrag. Diese Schiedsklausel hatte folgenden Inhalt: „Für sämtliche aus diesem Vertrag, seine Ausführung und Auslegung und über alle aus dem Gesellschaftsverhältnis sich ergebenden Streitigkeiten zwischen der Gesellschaft und einzelnen Gesellschaftern oder zwischen den Gesellschaftern soll unter Ausschluss des ordentlichen Gerichtsweges ein Schiedsgericht entscheiden. Hierüber werden die Parteien einen gesonderten Schiedsvertrag vereinbaren. Im Übrigen wird als Gerichtsstand Köln, soweit dies zulässig vereinbart werden kann, festgelegt." Den erwähnten separaten Schiedsvertrag schlossen die Parteien nie ab.

Das Oberlandesgericht Köln hatte den Antrag auf Feststellung, dass ein schiedsrichterliches Verfahren unzulässig sei, als unbegründet zurückgewiesen und die Wirksamkeit der Schiedsabrede bejaht (OLG Köln, Beschluss vom 10.05.2019 - 19 SchH 5/19). Zu unterscheiden sei, ob die Parteien lediglich einen Vorvertrag geschlossen oder sich bereits mit dem dafür erforderlichen Rechtsbindungswillen auf den Ausschluss der staatlichen Gerichtsbarkeit geeinigt hätten. Schon die Klausel im Gesellschaftsvertrag selbst erfülle die Mindestanforderungen an eine Schiedsklausel und sei dergestalt zu verstehen, dass lediglich ergänzende Regelungen Gegenstand des Schiedsvertrags hätten sein sollen. Durch die Geltung der gesetzlichen Regelungen zu schiedsrichterlichen Verfahren sei sichergestellt, dass die Mindeststandards an Mitwirkungsrechten und Rechtsschutzgewährung gewahrt seien.

Die Rechtsbeschwerde des Antragstellers gegen den Beschluss des Oberlandesgerichts Köln hat der Bundesgerichtshof als unzulässig verworfen.

Zwar sei die Rechtsbeschwerde der Antragsteller gem. § 574 Abs. 1 S. 1 Nr. 1, § 1065 Abs. 1 S. 1, § 1062 Abs. 1 Nr. 2 Fall 1 ZPO statthaft. Sie sei aber unzulässig, weil weder die Rechtssache grundsätzliche Bedeutung habe noch die Fortbildung des Rechts oder die Sicherung einer einheitlichen Rechtsprechung eine Entscheidung des Bundesgerichtshofs erfordere (§ 574 Abs. 2 ZPO). Bei der Rechtsbeschwerde in den Fällen des § 574 Abs. 1 Nr. 1 ZPO sind die Gründe darzulegen, die nach Ansicht des Beschwerdeführers die Zulässigkeit der Rechtsbeschwerde gebieten. Aus Sicht des Bundesgerichtshofs lag vorliegend insbesondere keine Divergenz vor. Die Antragsteller hatten auf Entscheidungen des Kammergerichts Berlin und des Oberlandesgerichts Hamm verwiesen und vorgetragen, in

den Entscheidungen seien Rechtssätze aufgestellt worden, zu denen die Entscheidung des Oberlandesgerichts Köln im Widerspruch stehe. Dies sah der Bundesgerichtshof anders. Sowohl das Kammergericht als auch das Oberlandesgericht Hamm hätten die in ihren Verfahren maßgeblichen Schiedsklauseln gemäß §§ 133, 157 BGB ausgelegt, ohne dabei die behaupteten abstrakten Rechtssätze aufgestellt zu haben. Die unterschiedliche Auslegung nicht identischer Vertragsklauseln begründe keine Divergenz.

Nach Ansicht des Bundesgerichtshofs erforderte die Rechtssache auch keine Entscheidung zur Fortbildung des Rechts. Die Frage, ob die Vertragsparteien trotz des Hinweises auf einen gesondert abzuschließenden Schiedsvertrag bereits eine wirksame Schiedsvereinbarung getroffen haben, sei eine Frage des Einzelfalls und von den Tatgerichten durch Auslegung gemäß §§ 133, 157 BGB unter Berücksichtigung der Bestimmung des § 154 Abs. 1 Satz 1 BGB zu ermitteln. Entscheidend sei, ob sich aus der Vereinbarung der Wille der Parteien ergebe, Rechtsstreitigkeiten aus einem bestimmten Rechtsverhältnis unter Ausschluss der staatlichen Gerichte einem Schiedsgericht zuzuweisen.

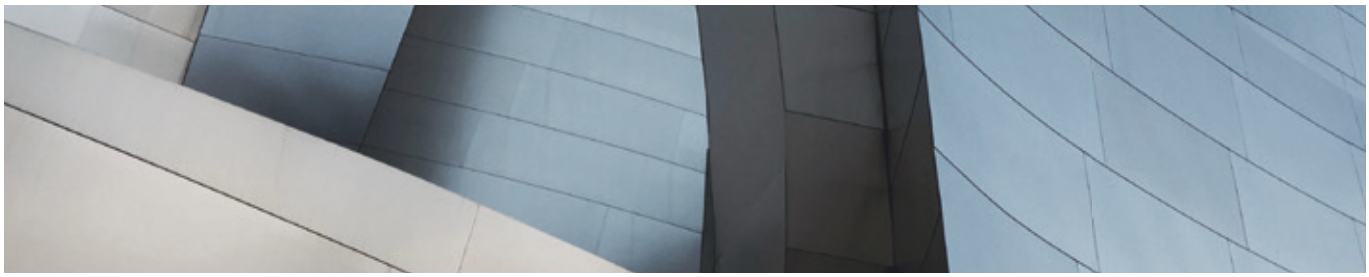
Einordnung

Die Entscheidung führt einmal mehr vor Augen, dass bei der Vereinbarung von gesellschaftsrechtlichen Schiedsabreden höchste Vorsicht geboten ist. Häufig wird jedoch weder der Abfassung der Schiedsvereinbarung selbst noch den gesetzlichen Mindestanforderungen die notwendige Aufmerksamkeit geschenkt. Sollte ein Schiedsvertrag die erforderlichen Mindestanforderungen nicht erfüllen, ist er anzupassen. Nur so ist zu gewährleisten, dass es im Fall von Streitigkeiten keine unliebsamen Überraschungen gibt und wider Erwarten doch die ordentlichen Gerichte zuständig sind. Durch die vorliegende Entscheidung des Bundesgerichtshofs wird der notwendige Mindestinhalt einer Schiedsvereinbarung deutlich umrissen. Gerade diese Voraussetzungen müssen Anwälte bei der Abfassung von Schiedsvereinbarungen beachten, um deren Zulässigkeit und Wirksamkeit sicherzustellen.

Darüber hinaus verdeutlicht die Entscheidung, dass bei der Begründung der Rechtsbeschwerde – entsprechendes gilt für die Begründung der Nichtzulassungsbeschwerde gem. § 544 ZPO für die Zulassung der Revision – mit größtmöglicher Sorgfalt vorgegangen werden muss. Es genügt bei der Darlegung der Divergenz insbesondere nicht der bloße Verweis auf vermeintlich abweichende Entscheidungen anderer Gerichte. Vielmehr muss der Beschwerdeführer vor allem einen für die anzufechtende Entscheidung erheblichen abstrakten Rechtssatz aufzeigen, der von einem bereits aufgestellten abstrakten Rechtssatz abweicht, auf dem die Vorentscheidung beruht. Auch ist darzulegen, dass die Gefahr der Entstehung schwer erträglicher Unterschiede in der Rechtsprechung besteht, etwa einer ständigen Fehlerpraxis, die eine Wiederholung besorgen lässt, oder die ernsthafte Gefahr einer Nachahmung durch andere Gerichte, oder dass das Berufungsurteil auf einem Rechtsfehler beruht, der geeignet ist, das Vertrauen in die Rechtsprechung zu beschädigen.

Vor diesem Hintergrund sollte der Prozessanwalt bereits in einem frühen Stadium die Rechtsmittelinstanz beziehungsweise die dritte Instanz in den Blick nehmen und instanzübergreifend denken. So empfiehlt es sich jedenfalls in der zweiten Instanz, verfahrensrechtliche und materiellrechtliche Ausführungen möglichst anhand der Rechtsprechung insbesondere desjenigen Senats des Bundesgerichtshofs zu machen, der gegebenenfalls später zuständig sein würde. Auch mögliche Verfahrensfehler der Instanzgerichte, insbesondere der Anspruch auf Gewährung rechtlichen Gehörs (Art. 103 Abs. 1 GG), müssen rechtzeitig vor das Berufungsgericht gebracht werden. Vorausschauendes Denken kann insofern letztlich den Erfolg eines langwierigen Rechtsstreits sicherstellen.

Christoph Pies



Think before you arbitrate – practical considerations to make the most of arbitration

Arbitration is a common alternative to litigation in insurance contracts' dispute resolution clauses, but what are the practical implications of choosing arbitration over litigation? And what do insurers need to think about when electing to resolve a dispute by way of arbitration? There are a number of considerations to take into account when looking at the commonly referenced pros and cons of arbitration and the key differences with litigation. This article provides an overview.

Arbitration provides the parties with a great degree of freedom in comparison to traditional court proceedings, allowing them to shape the dispute resolution process as they wish. The procedural rules of courts tend to be more rigid and the burden of processes such as disclosure are becoming ever more onerous and expensive to comply with.

Neutrality, procedural flexibility and the focus on parties' autonomy are some of the most appealing characteristics of arbitration. Another great advantage is the ability for the parties to choose the arbitrator(s) and ensure that they possess the necessary qualification and expertise to bring a dispute to a fair and efficient resolution. This is of particular relevance when dealing with insurance disputes given that some foreign courts may not be particularly experienced in determining complex insurance questions and coverage disputes. The enforcement of an arbitral award pursuant to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention") is also likely to be easier than the enforcement of a foreign court judgment.

The freedoms provided by arbitration should, however, be carefully considered and addressed by insurers when choosing to arbitrate a dispute in order to avoid uncertainty and delays.

Flexibility means some important choices need to be made

When opting for arbitration instead of litigation, the parties will need to choose not only the law governing the contract, but also the law of the seat of the arbitration and the procedural rules which will govern the conduct of the arbitral proceedings. It is important for insurers to understand the implications of each of these choices:

- Law of the contract – This is the substantive law which governs the contract and which will be applied to determine the outcome of the dispute
- Law of the seat – This is the procedural law which governs the arbitration proceedings. Among other things, the seat of the arbitration determines the extent to which local courts will be able to intervene in the arbitral process and to hear appeals of arbitral awards. Therefore, care should be taken to select an "arbitration-friendly" jurisdiction (in other words, a jurisdiction where the local courts are known to be supportive of arbitration) as the seat, with a view to avoiding unwarranted interferences with the arbitral process by the local courts. Notably, the seat of the arbitration also determines the location where the award will be deemed to be made, which is significant for enforcement purposes. Accordingly, it will usually be preferable to ensure that the chosen seat is a signatory to the New York Convention

– Procedural rules – In arbitral proceedings it is up to the parties to decide whether to adopt a set of established procedural rules from an arbitral institution (e.g. LCIA, ICC, ARIAS, etc.) or whether to create ad hoc procedural rules for the specific arbitration by agreement. In particular when choosing ad hoc arbitration, it will be important to ensure that the arbitration clause provides for the number of arbitrators who will hear a dispute and for the procedure to be used for their appointment

Arbitration clauses in insurance contracts tend to be fairly brief but it is important to ensure they address each of the above considerations in a clear and unequivocal way in order to avoid any ambiguity which could lead to uncertainty as to the parties' intention and ultimately give rise to unintended results. In particular, the importance of the law of the seat and of any institutional rules which may be chosen for the conduct of the arbitration should not be underestimated as they can make a very significant difference to the cost and efficiency of the process.

Confidentiality is not a given

Arbitral proceedings are traditionally understood to be confidential, as opposed to court proceedings which are usually held in public. This can be of interest to both insureds and insurers for a number of reasons, including for example the fact that an arbitral award will not set a legal precedent and that the confidentiality of the proceedings will serve to shield the parties from reputational risks which may be associated with a dispute. That can be particularly valuable in insurance contracts where there may be a dispute about policy interpretation where there is a reasonable disagreement between insureds and insurers with a very strong commercial relationship, and what is required is time and space to resolve that technical dispute privately and without publicity – which is an inevitable consequence of public dispute resolution, in particular where high profile companies and industries are involved.

Nevertheless, it should not be assumed that confidentiality obligations will automatically arise when choosing arbitration and it is important to note that, even if confidentiality obligations do arise, their scope can vary greatly. The question as to which (if any) confidentiality obligations arise and the extent to which those obligations apply will usually turn on the law of the seat of the arbitration, as well as on the applicable institutional rules and the terms of the arbitration clause, as the latter will constitute the arbitration agreement between the parties.

Under English law there is an implied duty of confidentiality on the parties and the arbitrators, which applies to hearings as well as to those documents disclosed during the arbitral proceedings and those documents which are generated for the purposes of the arbitration (e.g. pleadings, expert reports, etc.), but is subject to some exceptions (e.g. where disclosure is ordered by the court, or is in the interest of justice or in the public interest). However, there is no uniform approach to the confidentiality of arbitral proceedings globally and confidentiality is not the default position in all jurisdictions – by way of example, there is no implied duty of confidentiality in foreign jurisdictions such as Norway and Sweden, or in a number of US states.

Similarly, some institutional rules impose confidentiality obligations on the parties in very specific terms - see, for example, the 2020 LCIA Rules which now go so far as to request that the parties seek confidentiality undertakings from factual witnesses, experts and service providers who would not otherwise be bound by confidentiality obligations in the same way. However, other institutional rules will impose more limited obligations (e.g. providing only for the confidentiality of the arbitral award itself) or may not address confidentiality at all.

Accordingly, where the intention is to ensure confidentiality, insurers should familiarise themselves with the applicable law and institutional rules to understand the protection those afford and any limitations or exceptions to the same. When in doubt, it will be prudent for insurers to ensure that an express confidentiality provision is included in the arbitration clause, or subsequently agreed with the insured.

"Cheaper and quicker"?

Whilst arbitration has the potential to be cheaper and quicker than litigation, whether this will be the case in practice will inevitably turn on the specific circumstances of a dispute. For example, lower value and less complex claims could be suitable for resolution by way of an arbitration which is conducted mainly on paper, with limited time allocated to oral hearings (if necessary) and with a sole arbitrator in charge, leading to significant time and cost savings.

However, when dealing with higher value and more complex claims arbitration is less likely to result in cost savings. The most obvious and significant factor in this respect is that in arbitral proceedings the parties will be paying for the arbitrators' time, the hiring of the hearing venue and, where the arbitration is to be conducted pursuant to the rules of an arbitral institution, the administrative costs related to the institution's management of the case – these are all additional expenses in comparison to those that would be incurred in court proceedings. Some administrative costs may be saved, for example, by choosing ad hoc arbitration as opposed to institutional arbitration, although some would argue that an arbitral award is more likely to be complied with when it is made by a tribunal under the rules of a well-respected arbitral institution.

Where the entity of a claim is difficult to estimate at the outset and the objective is to achieve cost savings wherever possible, insurers may wish to consider incorporating in the arbitration agreement simplified rules for streamlined procedures to deal with lower value claims. Various institutions offer such options, see for example the ARIAS Fast Track Arbitration Rules or the ICC Expedited Procedure Provisions.

Other factors can also affect the likely duration of arbitral proceedings. For example, arbitrations can often get off to a slow start if the parties have difficulty reaching agreement on the appointment of the arbitrator(s), or where the arbitration agreement provides for ad hoc arbitration and the parties need to agree on the procedural rules to be applied to the proceedings after a dispute has arisen.

Depending on the composition of the arbitral panel, a tribunal's case management style is also likely to be more relaxed and reactive when compared to that of the local courts so the proceedings may not always be as speedy. Courts usually have stronger, or more well-established, powers in respect of sanctions and interim relief, therefore courts are more likely to take action to discipline the behaviour of parties who are looking to delay the proceedings or circumvent the rules. Where the appointed arbitrators are based in different locations or have particularly busy diaries, their limited availability could also lead to some delays in the proceedings.

Ultimately, however, the question of whether arbitration proceedings will be quicker than litigation proceedings is likely to turn on the relevant jurisdiction being considered as an alternative forum for litigation purposes. For example, arbitral proceedings may not necessarily be quicker than English court proceedings but they may well be quicker than litigating a dispute in foreign courts, especially if the local court system is not sophisticated or particularly experienced in dealing with insurance disputes. In the circumstances, arbitration can offer a neutral dispute resolution venue, with the advantage that the parties will be able to select arbitrators who have the necessary expertise.

Finality of arbitral awards

Whilst the proceedings themselves may not always be quicker, arbitral awards are usually intended to be final and binding on the parties, with the grounds of appeal in arbitration proceedings generally limited to jurisdictional issues or procedural irregularities.

By way of example, in respect of London-seated arbitrations, the Arbitration Act 1996 provides that an arbitral award can only be challenged in the English courts for: (i) a lack of substantive jurisdiction (Section 67); (ii) a serious irregularity causing substantial injustice (Section 68); or (iii) subject to obtaining leave from the court, an appeal on a point of law arising out of an award (Section 69). Yet, the applicability of Section 69 can be, and often is, excluded by agreement.

Further, the extent to which an award can be challenged can be limited by the chosen institutional rules which govern the conduct of the arbitration – for example, various institutional rules provide that parties who choose to adopt them waive the right to any form of appeal. In the context of a London-seated arbitration, this means that there will be no right to appeal on a point of law under Section 69.

Accordingly, insurers should be mindful not just of their choice of seat but also of which institutional rules are selected in the arbitration agreement and what the implications of those rules will be in practical terms under the relevant law.

Procedural differences

As opposed to litigation, arbitration allows the parties to agree on a number of procedural aspects such as the language in which the proceedings will be conducted, whether their written submissions should take the form of pleadings or memorials, the extent of any factual and/or expert witness evidence required and the scope of the disclosure required in the proceedings.

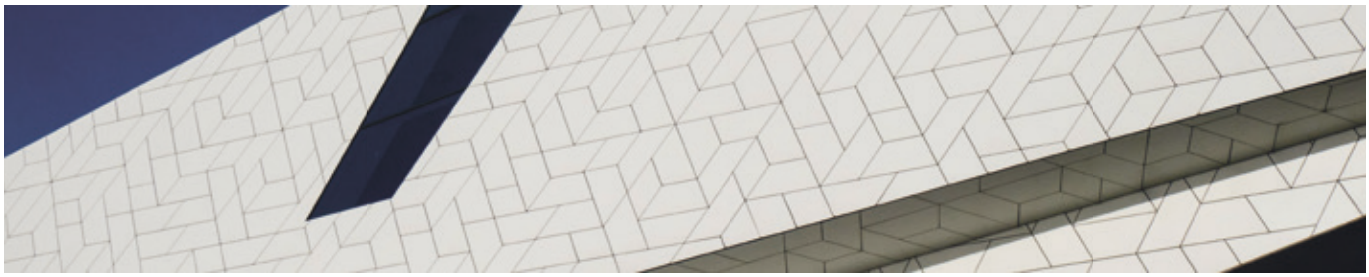
The scope of disclosure is probably one of the most significant aspects where the traditional approach in arbitration is for document production to take place pursuant to document requests rather than pursuant to a duty to disclose all documents, whether helpful or unhelpful, which are relevant to the issues in dispute. The parties are, however, free to depart from the traditional arbitration approach if they so wish.

It is also worth noting that, whilst most arbitral tribunals will be empowered to make awards on the arbitration costs (i.e. the administrative / institutional costs) and the legal costs of the proceedings, there is usually no cost budgeting in arbitration and the costs awards made by an arbitral tribunal can therefore be more unpredictable than in those made by a court.

Conclusion

Whilst arbitration will not necessarily always be cheaper or quicker than litigation, it does offer some significant advantages, such as neutrality, procedural flexibility and the option of confidentiality. Whether arbitration as an alternative form of dispute resolution meets insurers' dispute resolution needs will turn on their specific circumstances and objectives, but it is certainly a valuable alternative to traditional court proceedings. The key is to ensure that due consideration is given to its practical implications from the outset in order to make the most of it.

Flavia Pizzino



Quebec Superior Court confirms Arbitrability of Insurance Coverage Disputes

Ending years of ambiguous jurisprudence, Justice Gary Morrison confirmed, in 9369-1426 Quebec Inc. (Restaurant Baton Rouge) v. Allianz Global Risks, that Quebec law allows the arbitration of disputes under an insurance policy to the exclusion of the courts.

Facing business interruption losses due to COVID-19, certain Baton Rouge franchisees sought to certify a class action against Allianz on behalf of all its insured restaurants and bars in Quebec claiming coverage under a property insurance policy. On behalf of Allianz, Clyde & Co moved to dismiss the action and prevent certification based on the Policy's dispute resolution clause, which provided for mediation and/or binding arbitration. Justice Morrison granted the motion and dismissed the action.

Recourse to Arbitration to the Exclusion of the Courts

Article 3148 of the Civil Code of Quebec ("CCQ") establishes the personal and subject matter jurisdiction of the Quebec courts except in cases where parties have contractually agreed to submit a dispute to either the jurisdiction of a foreign court or to arbitration. This general rule is followed by three specific provisions regarding jurisdiction over consumer and employment contracts (Article 3149), asbestos and other minerals (Article 3151), and insurance policies (Article 3150). Notably, Articles 3149 and 3151 provide that Quebec courts have exclusive jurisdiction over such matters, such that they cannot be arbitrated.

In regard to contracts of insurance, Article 3150 provides that the Quebec courts also have jurisdiction over a dispute arising out of a contract of insurance where the Insured or the insured property is located in Quebec. Unlike Articles 3149 or 3151 however, Article 3150 is silent on whether jurisdiction can be waived by the inclusion of an arbitration clause.

In this silence, past court decisions have inadvertently grouped Article 3150 together with Article 3149 and 3151, and in obiter dicta considered that, just like consumer contracts, contracts of employment, and asbestos related contracts, insurance policies could not be subject to arbitration clauses even though, as noted above, Article 3150 is silent on this question.

For example, in *Construction injection EDM inc. v. SNC-Lavalin Construction (Atlantic) Inc.*, 2013 QCCS 5049— which was not an insurance dispute— the Superior Court, in an *obiter dictum*, inadvertently groups together Article 3150 with Articles 3149 and 3151 to find that the legislature has excluded the recourse to arbitration for all three. In *United European Bank and Trust Nassau Ltd. v. Duchesneau* 2006 QCCA 652, also in *obiter,* the Quebec Court of Appeal accepted a party's submission that Articles 3149 through 3151 prevent the arbitration of disputes. The same holding is also found in *KOM International inc. v. Swiednicki*, 2018 QCCS 546.

As noted, none of these cases actually involved insurance policies or an exercise of the courts' jurisdiction pursuant to Article 3150. They all appear to be based upon a reading of the Supreme Court's decision in *GreCon Dimter inc. v. J. R. Normand inc.,* 2005 SCC 46, despite the fact that *Grecon* itself clearly species that only Articles 3149 and 3151 exclude the recourse to arbitration.

Insurances Contracts can be Arbitrated

In contrast, in *Baton Rouge*, Justice Morrison followed the only prior authority¬—in an insurance dispute—on Article 3150: *Mega Bloks Inc. v. American Home Insurance Company*, 2006 QCCS 5083. He concluded that in its silence, Article 3150 allows disputes under insurance policies to be submitted to resolution by arbitration. In doing so, Justice Morrison also noted the privileged position the Quebec legislature has granted to alternative dispute resolution in the *Code of Civil Procedure.*

This ruling is consistent with the legislative debate on the drafting of Article 3150 during the reform of the *Civil Code of Quebec,* where the legislature specifically elected to allow for the arbitration of insurance disputes.

There is nothing inequitable in Arbitrating insurance disputes

While class actions are an important forum for seeking access to justice, the Supreme Court of Canada has frequently ruled that an arbitration clause is to be respected *(Dell, Seidel)*, except where it is used unconscionably to prevent access to justice *(Uber Technologies Inc. v. Heller,* 2020 SCC 16). It is up to the legislature to enact specific legislation where other interests, such as protecting consumers or employees, are considered to be paramount over the liberty of contract.

In this regard, Justice Morrison also recognized that there is nothing inequitable in arbitrating an insurance dispute.

A Choice of District Clause does Not Preclude Arbitration

The other notable clarification in Justice Morrison's judgment is that a choice of district clause can coexist with an arbitration clause. In this case, as is often the case, the policy included both an arbitration clause and a choice of law clause which specified that

"The Courts in the Court District in which the Named Insured is located shall have exclusive jurisdiction in case of a coverage dispute."

Such clauses can appear to be contradictory—creating potentially fatal ambiguity as to the parties' intentions. However, Justice Morrison followed the longstanding principle of contractual interpretation to read both clauses together in a matter which preserves them both. In doing so, he determined that the policy contained both (i) an arbitration clause for resolution of disputes and (ii) a choice of district clause that specified the courts to which parties to the arbitration would seek assistance, if necessary, for the arbitration process, whether to appoint an arbitrator, seek emergency relief, or similar redress.

Clyde Comment

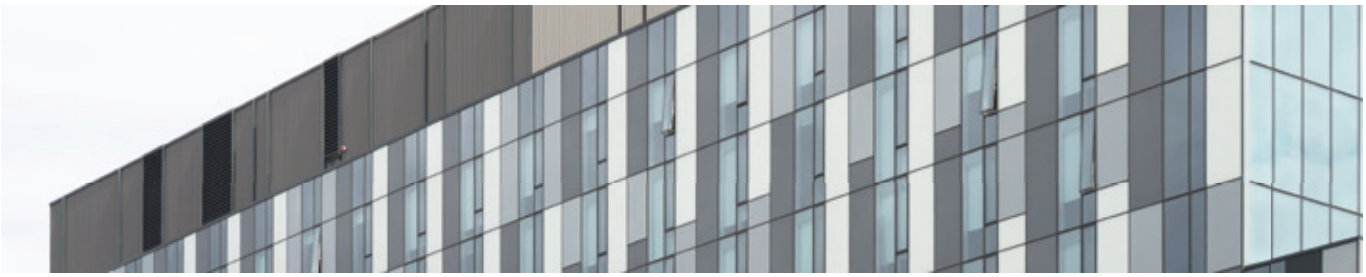
- Arbitration of insurance policies presents numerous advantages for commercial insureds and insurers, notably, the ability to have a dispute finally resolved in a timely process that is not subject to delays in the civil courts by arbitrators who are familiar with the businesses of both the insurer and the insured. As recognized by Justice Morrison, it's also consistent with Article 3150 CCQ and the legislative guidance that promotes alternative resolution of disputes
- It remains to be seen however to what extent the insurance industry will be willing to embrace arbitration as a preferred ADR method in commercial programs in Quebec, even with the added advantage that it is now recognized as a shield against coverage class actions

John Nicholl

Gabriel Archambault

Eric van Eyken

Audrey-Anne Guay



With a little help from my friends - court assistance in arbitration

Our clients often choose arbitration over filing a court case. They prefer to settle their dispute in private rather than in a public court in Germany, to name just one of the many reasons for choosing arbitration. However, arbitrators and tribunals do not have the same powers as judges. For example, they are not able to issue subpoenas to the witness.

However, the German Code of Civil Procedure ("Zivilprozessordnung" – CCP) regulates an exception to this rule. According to section 1050 CCP state courts must assist arbitrators in the taking of evidence when asked to do so. For that, either the arbitral tribunal or a party with permission of the tribunal need to request assistance. The request needs to be handed in in writing and in German language at the competent court, the local court (*Amtsgericht*) in whose judicial district the requested act (of taking evidence) shall take place. As the CCP only requires parties to be represented by a German lawyer before district courts (*Landgericht*), even foreign lawyers are therefore in principle able to request German court assistance for arbitral proceedings.

The German court reviews the 1050 CCP application as to whether the arbitrators cannot undertake the actions themselves and that the CCP allows for the requested act to be carried out by a court (German procedural law equivalency), and if so, must provide assistance. The court may not investigate whether the requested act is in fact necessary for deciding the dispute. However, it is not possible to transplant typical legal instruments from other jurisdictions which are unknown to and therefore not recognised by the German law, e.g. US-style discovery of documents.

Arbitrators and parties may according to section 1050 CCP rely on court assistance for the taking of evidence and, in contrast to Article 27 of the UNCITRAL Model Law, also for other judicial acts. Court assistance in the taking of evidence makes the use of coercive measures possible which can help to obtain a statement of a party, witness or expert witness which the arbitrators otherwise would not have been able to get. Other possible acts which can be requested are the administration of oaths, letters rogatory to a foreign court for taking a statement of a witness who is hard to reach, requests to see a document currently in the possession of a governmental agency, formal services of documents and services overseas, to name just a few. The arbitrators and the parties have the right to be present when court takes the evidence. This is required as the court does not itself assess/weigh the evidence taken on behalf of the arbitrators.

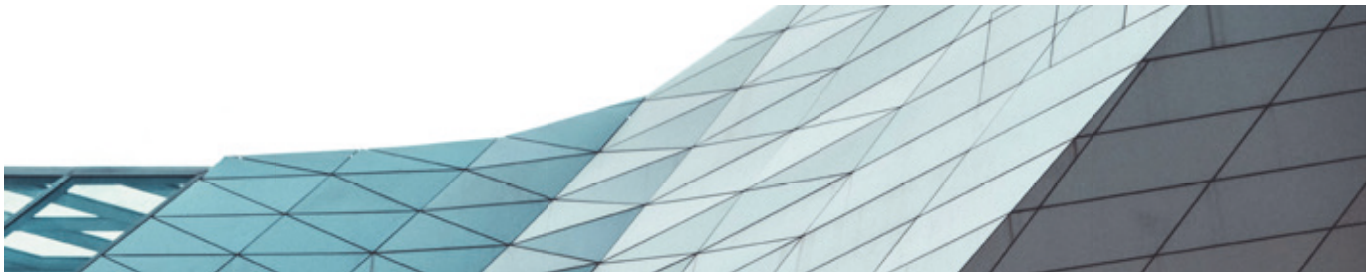
In cases in which the arbitrators have the powers to take evidence, but this would be unduly burdensome (disproportionate) 1050 CCP is being applied respectively. Hence, in those cases court must assist as well when being asked to do so. An exception are high expert costs as those are not considered disproportionate.

German court assistance is being granted to any arbitral tribunal or party of arbitral proceedings requesting for it, no matter where the arbitration is seated. Section 1025 (2) CCP explicitly states that even when the arbitration is seated outside of Germany or has not been chosen yet, assistance of German courts within their jurisdiction may be sought. Hence, German court assistance is a legal instrument which is available to tribunals and parties around the globe for evidence taking in Germany. The competent court to ask for assistance is the one whose district the witness resides in or the act (of taking of evidence) is supposed to be undertaken in.

Court assistance may be a door opener for taking evidence which cannot be otherwise obtained under arbitration rules as well as for expanding the variety of means used to build a case strategy by gaining access to judicial acts. Moreover, it is also available to foreign seated arbitrations under certain conditions.

Georg Scherpf

Carina von Berlepsch



Incoterms® 2020: Die wichtigsten Änderungen

Die Incoterms sind eine Reihe vorformulierter Klauseln, die Geschäftsparteien in ihre Verträge einbeziehen können. Sie beziehen sich auf den internationalen Warenhandel und regeln insbesondere den Gefahren- bzw. Kostenübergang im Zusammenhang mit der Lieferung von Waren vom Verkäufer an den Käufer. Heutzutage sind sie bei internationalen Handelstransaktionen weit verbreitet. Die Internationale Handelskammer (ICC) veröffentlichte die erste Version der Incoterms im Jahre 1936. Seitdem werden sie ungefähr alle zehn Jahre aktualisiert. Die Incoterms 2020 sind die neunte Version der Klauseln, die am 10.09.2019 erschienen und am 01.01.2020 in Kraft getreten sind. Wie die Incoterms 2010 umfassen die Incoterms 2020 elf Regeln. Mit den Incoterms 2020 entfällt allerdings die Klausel DAT und die neue Klausel DPU wird eingeführt. Die Incoterms 2020 sind also die folgenden:

- EXW (EX Works)
- FCA (Free CArrier)
- FAS (Free Alongside Ship)
- FOB (Free On Board)
- CFR (Cost and FReight)
- CIF (Cost Insurance Freight)
- DAP (Delivered At Place)
- DPU (Delivered at Place Unloaded)
- CPT (Carriage Paid To)
- CIP (Carriage Insurance Paid)
- DDP (Delivered Duty Paid)

Die neugeschaffene Klausel DPU ersetzte die Klausel DAT (Delivered At Terminal), wobei die zwei Klauseln keine erheblichen Unterschiede aufweisen. Der Verkäufer, der alle Transportkosten trägt, ist verpflichtet, die Waren am Bestimmungsort zu entladen. Alle Kosten, die nach der Entladung entstehen, sind vom Käufer zu tragen. Der Verkäufer trägt das Risiko bis zur Ankunft im Terminal. Als Terminal ist jeder Bestimmungsort zu verstehen, der zum Beispiel ein Hafen oder Flughafen sein kann. Die Änderung in den Incoterms 2020 soll dies verdeutlichen. Bei DPU handelt es sich um die einzige Incoterms-Regel, die den Verkäufer verpflichtet, die Ware zu entladen. Ist der Verkäufer dagegen nicht in der Lage, die Entladung der Ware zu organisieren, soll er stattdessen eine Lieferung nach DAP vereinbaren.

Sowohl die CIF als auch die CIP-Klausel beziehen sich auf die Versicherungsdeckung der Ware. Unter CIP liefert zwar der Verkäufer an den Frachtführer, aber er bezahlt den Transport und die Versicherung bis zum benannten Bestimmungsort. Die CIF-Klausel sieht dasselbe vor, kann jedoch nur für den Seetransport verwendet werden, bei welchem der Bestimmungsort immer ein Hafen ist und die Lieferung auf einem Schiff erfolgt. Unter den Incoterms 2010 war der Verkäufer verpflichtet, eine Grundversicherung abzuschließen, die der Versicherungsdeckung ICC-C (Institute Cargo Clauses) entsprach und Mindestversicherungsschutz gegen ausdrücklich genannte Schadensereignisse umfasste. Diese Versicherung stellte sich allerdings als ungeeignet für Fertigwaren heraus. Für solche Waren wird häufig die CIP-Klausel benutzt. Aus diesem Grund sind die Versicherungsanforderungen unter der CIP-Klausel nach den Incoterms 2020 erhöht. Erforderlich ist nun dabei die Versicherungsdeckung ICC-A (Institute Cargo Clauses), die alle Risiken umfasst. Die Versicherungsanforderungen unter der CIF bleiben unverändert.

Geändert wurde in den Incoterms 2020 die FCA-Klausel, um eine Zusatzoption vorzusehen. Die Parteien können nun vereinbaren, dass der Käufer den Frachtführer anweisen kann, ein Bordkonnossement für den Verkäufer auszustellen. Hintergrund der Änderung waren Beschwerden bei der Verwendung der FOB-Klausel, die bei Containerverschiffungen häufig herangezogen wird. Der Verkäufer hat typischerweise keine Kontrolle über den Container, nachdem er im Hafen eingetroffen ist. Trotzdem trägt er das Risiko für den Container noch bis zur Verladung auf das Schiff. Um das Problem zu umgehen, ist empfohlen, dass die Lieferung unter FCA vereinbart wird. Im Gegensatz zu einer Lieferung nach der FOB-Klausel war es allerdings bisher schwierig für einen Käufer, ein Bordkonnossement unter FCA zu bekommen, was typischerweise erforderlich ist, um ein Akkreditiv zu erhalten und somit die Zahlung abzusichern. Nach der neuen FCA-Klausel besteht jedoch eine solche Möglichkeit. Es wird bereits davor gewarnt, dass dies keine endgültige, sondern nur eine Interim-Lösung ist, solange die Vorlage eines Bordkonnossements für ein Akkreditiv erforderlich ist.

Die Kostendarstellung ist in den Incoterms 2020 übersichtlicher. Alle Kosten, die sich auf bestimmte Incoterms-Klauseln beziehen, sind im Artikel A9/B9 zu finden. Dies trägt zur Aufklärung der Kostenverteilung zwischen Käufer und Verkäufer bei.

Die Incoterms 2020 gehen nicht mehr davon aus, dass eine dritte Partei, ein Spediteur, den Transport der Waren zwischen Verkäufer und Käufer übernimmt. In den Incoterms 2020 wird dagegen berücksichtigt, dass der Verkäufer und/oder der Käufer den Transport mit eigenen Transportmitteln durchführen können. Diese Änderung ist in den Klauseln FCA, DAP, DPU und DDP ersichtlich.

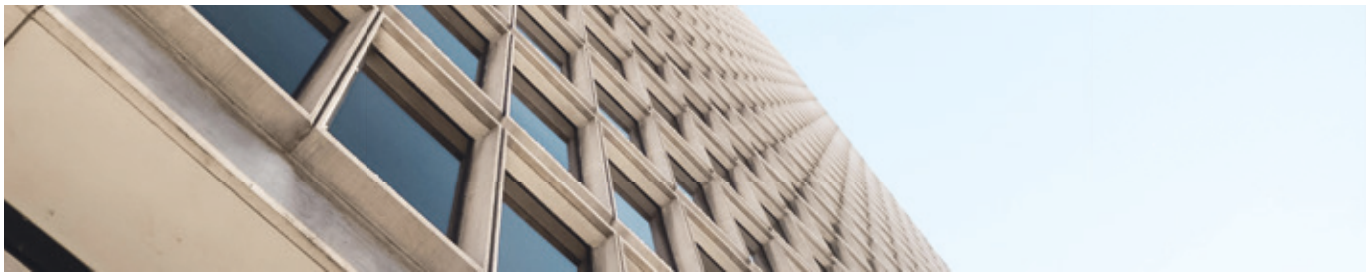
Deutlicher ist in den Incoterms 2020 auch die Darstellung der Pflichten und Kosten in Bezug auf die Anforderungen an die Transportsicherheit. Die darauf bezogenen Pflichten werden insbesondere in den Artikeln A4 und A7 vorgesehen, während die relevanten Kosten im allgemeinen Kostenartikel A9/B9 geregelt sind.

Die elf Incoterms 2020-Klauseln sind in zwei Gruppen aufgeteilt. Entscheidend für die Aufteilung ist die Art der Lieferung. Die größere Gruppe enthält sieben Klauseln, die unabhängig von der Transportart verwendet werden können. Diese sind die folgenden: EXW, FCA, DAP, DPU, CPT, CIP, DDP. Die vier Klauseln der zweiten Gruppe können allerdings ausschließlich den Transport in der Binnen- und Seefahrt regeln und dürfen nicht für den Transport auf der Straße, in der Luft oder auf der Schiene verwendet werden. Diese sind: FAS, FOB, CFR, CIF.

Auch nach dem Inkrafttreten der Incoterms 2020 bleibt es für die Parteien möglich, die Anwendung der vorherigen Incoterms 2010 zu vereinbaren. Eine solche Vereinbarung muss jedoch deutlich sein, sodass allen Parteien klar ist, welche Bedingungen jeweils Anwendung finden.

Dr. Henning Schaloske

Dr. Styliani Ampatzi, LL.M.



Climate change, governments and human rights

In recent months, the EU, the UK, China and five other countries[1] have announced more ambitious commitments for cutting their greenhouse gas emissions. But even if made good, current pledges would not meet the globally agreed aim of holding warming well below 2°C, and pursuing efforts to limit warming to 1.5°C. Activists and others are now bringing rights-based climate cases in an effort to force countries and regions to be more ambitious.

Paris Agreement: NDCs

The 2015 Paris Agreement is a legally binding international treaty on climate change. Its goal is to limit global warming to well below 2, preferably to 1.5 degrees Celsius, compared to pre-industrial levels. Signatory countries are to make Nationally Determined Contributions (NDCs) – the efforts they promise to make to reduce national emissions and adapt to the impacts of climate change – and update these every five years, beginning in 2020. The idea is that these NDCs should become progressively more ambitious over time.

Climate Action Tracker ("CAT") monitors various countries representing around 80% of global emissions and 70% of the world's population. It assesses what steps each country should be taking in order to limit global warming to below 2 degrees and below 1.5 degrees, and rates their current policies and their promises (including NDCs) to 2030 against those benchmarks. The UK's first NDC promised emissions cuts of 57% from 1990 levels by 2030, and this was rated as "insufficient" by CAT - compatible with up to 3 degrees of warming. In its December 2020 revised NDC the UK strengthened this promise to 68% and CAT stated *"this development would make the UK one of the first countries globally to bring its domestic emissions into line with what would be necessary globally for the Paris Agreement's 1.5°C limit"*. A few days later the EU strengthened its NDC from "at least 40%" (rated as "severely inadequate" by CAT) to "at least 55%". This new promise is rated as "insufficient", and CAT called for a reduction of 65% by 2030 in order for the EU to become the first region to be in line with the Paris Agreement.

For example, the German Federal Government (*Bundesregierung*) has set out its national climate targets in a binding way in a Climate Protection Act entered into force on 18 December 2019. The Climate Protection Act provides for a gradual reduction in greenhouse gas emissions compared with 1990 levels, with at least a 55 percent reduction target by the year 2030. In the long term, the Federal Government is pursuing the goal of greenhouse gas neutrality by 2050.

[1]Argentina, Chile, Kenya, Norway and Ukraine.

Human rights cases

The substantial gap between current and proposed emissions reductions and what is called for under the Paris Agreement has prompted a number of legal actions around the world, including in the EU, inviting courts to order governments to adopt more ambitious climate policies. Many of these are framed in terms of violations of citizens' human rights. The most prominent to date is the Urgenda case against the Dutch government. In December 2019 the Dutch Supreme Court upheld all lower court rulings in the case and ordered the government to cut emissions by 25% from 1990 levels by the end of 2020, instead of the 21% promised (the government complied, largely by severely cutting capacity in its remaining coal-fired power stations). The Supreme Court based its judgment on the obligation of the State to protect its residents' right to life (Article 2 of the European Convention on Human Rights – ECHR) and right to family and private life (Article 8 ECHR).

In July 2020, in a partial victory for Friends of the Irish Environment, the Irish Supreme Court quashed the government's National Mitigation Plan on the basis that it was not specific enough about the steps that would be taken in the short and medium term to achieve the goal of a low-carbon economy by 2020: again, this was by reference to the ECHR. Courts in the UK have rejected challenges; other cases are pending in Belgium, France, Sweden and Switzerland.

At the beginning of 2020, several cases have been brought to the German Constitutional Court claiming that with the Climate Protection Act the German Government missed to implement the necessary emissions reductions and only implemented insufficient climate protection targets and measures. As a result, the State breached, amongst others, its obligation to protect the constitutional right of human dignity and the right to life and physical integrity, as well as – with regard to ECHR – its residents' right to life (Article 2 ECHR) and right to family and private life (Article 8 ECHR). With its decision of 24 March 2021, the German Constitutional Court finally found that the protection of life and physical integrity includes protection against impairment of fundamental rights by environmental pollution, regardless of who causes it and what circumstances threaten it. Hence, the state's duty to protect also includes the obligation to protect life and health from the dangers of climate change.

Some activists are concerned that national courts are not yet willing to order the deep emissions cuts that would be compatible with keeping warming below 1.5 degrees. For example, even after the emissions reduction ordered in Urgenda (25% by the end of 2020 instead of 21%) the Netherlands is not on track to meet CAT's recommended reduction of 65% by 2030. And the figure of 25% was chosen because it was at the bottom of the range of 25-40% reductions proposed by developed countries at that stage; the court declined to order the government to be more ambitious.

Portuguese Youths case in ECtHR

The Urgenda ruling was an important driver behind a case commenced in the European Court of Human Rights (ECtHR) in September 2020. Six Portuguese youths have brought the case against all 33 members of the ECHR - the EU27 plus the UK, Russia, Switzerland, Norway, Switzerland, Turkey and Ukraine. As in the Urgenda case the applicants allege that by failing to take sufficient climate action, the states have breached Articles 2 and 8 of the ECHR, which establish the right to life and the right to family and private life. But in addition they allege that the states have discriminated against youth, breaching Article 14 of the ECHR, as climate change will impact youth more than older generations: *"There is no objective and reasonable justification for shifting the burden of climate change onto younger generations by adopting inadequate mitigation measures"*. The applicants seek an order requiring each of the 33 states to adopt more ambitious climate action in line with its "fair share" of the global reductions needed in order to keep warming below 1.5 degrees.

Those seeking to enforce their human rights would usually be expected to seek redress in their national courts, which might then refer the matter to the ECtHR. The applicants invited the ECtHR to apply an exception to this rule, which applies where there is no adequate remedy that is reasonably available to the individual concerned. This was partly due to the challenge of mounting proceedings in 33 national courts. But they also seek an order for more ambitious collective climate action across Europe, which would be much harder to achieve in separate national proceedings. If the ECtHR were to rule in their favour then the applicants would seek to enforce the judgment through the national courts.

On 30 November the ECtHR decided that the case is admissible, which is highly significant in itself (few "direct" applications are accepted). The court also granted the complaint priority on the basis of the *"importance and urgency of the issues raised"*. The 33 states now have to file their defences by the end of February 2021. Strikingly, one of the questions sent by the court to the parties was whether the applicants' right under Article 3 of EHCR was being violated. Article 3 states: *"No one shall be subjected to torture or to inhuman or degrading treatment or punishment"*.

Conclusion

Rights-based climate cases are a relatively new phenomenon: in 2015, when Urgenda started their action, there had only been five in total around the world; there are now over 60. This is now a fast-developing field and the Portuguese Youths case is easily the most ambitious to date. Will courts actually order countries to make the deep cuts in emissions needed to avert catastrophic warming? This could become more likely if other countries follow the UK's lead by promising reductions that put them on track for Net Zero by 2050.

Nigel Brook

Dr. Henning Schaloske

Covid-19 Canada: Closing Arguments by Video Conference - The Show Must Go On

Promoters of international arbitration as a means of resolving disputes will often point to the same well known benefits: speed, proportionality, flexibility, pragmatism and business focus. What happens to these benefits, though, when an in-person hearing becomes impossible because of Covid-19?

Our successful experience with a marathon 10 hour virtual arbitration hearing on March 25 involving 12 active participants and approximately 30 observers in Europe, the UK, the U.S. and Canada suggests that the show can go on in spite of the coronavirus, provided that the arbitration panel and the parties are willing to be flexible and pragmatic about practical issues and technical constraints.

Following marathon discoveries involving 43 depositions in many different places, some of them by video-conference, our multi-party reinsurance arbitration was heard by the 3 person Panel in Edmonton in January 2020, nearly a year to the day after the initial procedural hearing. The parties were to reconvene before the Panel in Toronto for one day of closing argument in late March 2020.

As the coronavirus went from a local, to regional, to global pandemic that closed borders and airports, the challenge was how to come up with virtual hearing arrangements that would comply with the arbitration schedule and accommodate the participants' inability to leave their homes, while still respecting the most basic rule of the adversarial system – audi alteram partem – that underlies both the Model Law (Article 18) and the NY Convention (Article V(1)(b)).

Fortunately the Panel, the parties and the court reporter had a lot of experience working together and were sufficiently committed to the process that arrangements for the hearing could be hammered out quickly and collaboratively. The platform chosen was BlueJeans, and although there were occasional technical hiccups, the hearing (including set-up) was completed in about 10 hours with the Panel, the court reporter, all counsel and all clients and observers participating from their homes.

Some takeaways and thoughts for others who may find themselves in the same situation:

- **This feels weird:** for counsel who are used to the more traditional courtroom or arbitration hearing settings, the intimacy of speaking from your home office or your living room to the Panel in their home offices or living rooms is disorienting and takes some getting used to. In our arbitration, the Panel and counsel had fortunately evolved a less formal style, and this made the transition to virtual reality easier
- **Talk early, talk often:** in our arbitration the Panel, counsel, and the court reporter had already established channels of communication with designated "point persons" for scheduling and technical issues. This allowed early and effective consideration of alternate plans for the hearing, once it became apparent that an in-person hearing would not be possible, and decisions could be made without having to get all stakeholders on a conference call
- **Technical wizardry:** conferencing technology has come a long way, and not everyone who is using it has to understand it, as long as the technical point people and their IT support do. A technical moderator or master of ceremonies helps, and counsel may need their own technical assistance in presenting PowerPoints and other audio visual material. The technical point people need to speak to IT professionals and vendors to make a joint determination as to what software will be selected. In this regard, questions need to be asked about how individual users will make use of it. This can be a challenge, as most participants will access the software at home without IT tech support, and on computers that will have a variety of security measures and capabilities
- **Testing, testing:** Run a test of the software. And run that test again, expanding the circle of those who participate in the test to include first the core team, then other counsel, and clients, and finally all who will be present at the arbitration (including any court reporters and other vendors). In this regard, it is key to be patient and to remind people that the purpose of testing is to identify and resolve aspects that may go wrong. Lawyers are not used to presenting unfinished work to arbitrators or clients, even in a test environment. However, the purpose of testing is to ensure that the software used is properly accessed by everyone, work out technical challenges, and get everyone familiar with how its's used -especially locating the mute button! In conducting a test, the point people have to be humorous and engaging as everyone learns how the software works
- **Be prepared:** to revisit the software used following a test. It has to work for everyone. Will follow-up be required with the client's IT team to allow installation? Does a user want a private test? Lawyers too often think of making adjustments as an admission that a mistake was made. That's not the purpose of testing: which is rather to ensure that the hearing goes forward without interruption

- **Whole Day Plan:** Consider not just the virtual hearing itself, but the rest of the day. When can people log-in that morning? How will break-out sessions happen? How will the Panel deliberate? How do co-counsel and clients give input? What's happening during lunch and breaks?
- **Think about lead counsel:** Those actually arguing must be able to both see and engage with the Panel and control any presentation or exhibits being shown. Will they require a second screen or device (such as a second iPad) to make that happen? What about their background and environment? What about the wall art behind them? Ask them to think about what adjustments to their space are required so that they feel comfortable and professional presenting an argument in their environment
- **Imperfection is normal:** As noted above, there is an intimacy in delivering argument by videoconference from one's home. There will be hiccups, whether noises from outside, kids screaming, hungry pets, or internet disconnects. What's important is that everyone participating expects that those will happen. In this regard, our pre-hearing testing was important in setting expectations
- **Have a Plan C:** Have a back-up plan ready just in case, whether it's ensuring the VC is being recorded should the court reporter disconnect, a dial-in number in case a participant can't connect, or being ready with alternative dates
- **Competent real-time court reporting is golden:** our court reporter Angela Gunn was truly the hero of the day. Transcribing an all-day virtual hearing with 12 participants and a live real-time feed takes experience, discipline, stamina, and the ability to deal with problems without getting flustered. Find someone who has done this before, if possible. In our arbitration it helped that we had been working with Angela and her colleagues since the outset, so she already knew who was who and was familiar with people's voices and speaking styles.

Bottom line

If there is a genuine common will to hold a virtual hearing, there is a way to do it without prejudicing the client's interests, while maintaining the prerogatives of the Panel and the right of each party to a fair hearing. It is not the same, but (barking dogs and dubious taste in wall art aside) it is not better or worse than an in-person hearing, it's just different, so it takes some thought and preparation before you do it for the first time.

Heather Gray

John Nicholl

Eric van Eyken

Non-Resident Employment Visa Requirement for Arbitral Proceedings in Hong Kong Lifted in New Scheme

In a continuing series of initiatives to significantly enhance Hong Kong's role as a global international centre for legal and dispute resolution services, the HKSAR Government, on 29th June 2020, announced the launching of a two-year pilot scheme to allow those non-Hong Kong residents participating in arbitration proceedings in Hong Kong to do so as visitors and without the need for obtaining employment visas ("Scheme")[1] . Arbitral proceedings include, for example, attendance at hearings, case management conferences, client meetings for preparation, and interviews of experts or witnesses within Hong Kong etc.

To be eligible for the Scheme, a small number of criteria must be met by the individual:

- In respect of the individual, the basic requirement is that the person must be able to visit Hong Kong visa-free. Currently Hong Kong allows nationals of about 170 countries and territories to visit Hong Kong visa-free for periods ranging from 7 to 180 days, depending on nationality[2] . Those eligible under the Scheme will be able to stay in Hong Kong to participate in arbitral proceedings for the duration of the visa-free period for their relevant nationality as-granted upon arrival
- The individual must then also be one of four categories of participant in arbitral proceedings being (i) arbitrators; (ii) expert/factual witnesses; (iii) counsel in the arbitration; and (iv) parties to the arbitration
- Finally, those satisfying the requirements above, must then obtain a letter of proof ("Letter") from a qualified institution for presentation upon arrival at Hong Kong's immigration inspection points stating that they are eligible to participate in arbitral proceedings in Hong Kong

It should be noted that:

- The Scheme does not cover residents of Mainland China, Macau or Taiwan, or those individuals who require a visa/ entry permit to enter Hong Kong; and
- The letter of proof does not guarantee entry into Hong Kong, nor does it allow non-visitor activities to be conducted outside the Scheme parameters for which a visa should be obtained in the usual way, if such activities are to be undertaken

The Letter must be obtained from one of those qualified arbitral and dispute resolution institutions and permanent offices in Hong Kong which satisfies the criteria set out under Article 2(1) of the *"Arrangement Concerning Mutual Assistance in Court-ordered Interim Measures in Aid of Arbitral Proceedings by the Courts of the Mainland and of the HKSAR"*[3] currently (at the date of publication) being:

- Hong Kong International Arbitration Centre (HKIAC)
- China International Economic and Trade Arbitration Commission Hong Kong Arbitration Center (CIETACHK)
- International Court of Arbitration of the International Chamber of Commerce – Asia Office (ICC)
- Hong Kong Maritime Arbitration Group
- South China International Arbitration Center (HK)
- eBRAM International Online Dispute Resolution Centre

For those ad-hoc arbitrations not governed by an arbitral institution, but which are held in *"reputable venue(s) with established and well-equipped hearing facilities (namely, the Hong Kong International Arbitration Centre and the DoJ)"*, then the letter must be obtained from such venues.

The following information (with documentary support) is likely to be required by the qualified arbitral institution in order for them to issue any Letter:

- the personal particulars of the applicant for the Letter and their role in the arbitration
- estimated arrival and departure date to and from Hong Kong;
- the scope of the arbitral proceedings for which entry under the Scheme is required, for example, case management conference and where and when and for how long activity is intended to take place;

[1]https://www.info.gov.hk/gia/general/202006/29/P2020062900772.html
[2]https://www.immd.gov.hk/eng/services/visas/visit-transit/visit-visa-entry-permit.html
[3]https://www.doj.gov.hk/pdf/2019/list_of_institutions_e.pdf

The HKSAR Government has said it will review the scheme at the end of the two-year pilot period, and notes that any person covered by the Scheme is still subject to the current COVID-19 restrictions for the time being, under which: (i) non-Hong Kong residents coming from overseas countries and regions by plane will be denied entry to Hong Kong for the time being; and (ii) non-Hong Kong residents coming from the Mainland, Macao and Taiwan will be denied entry to Hong Kong if they have been to any overseas countries and regions in the past 14 days.

Jon Howes

Christopher Short

The Klein-Klein of Climate Change Contracts – Event Report

On 22 March, as part of the 2021 Hamburg International Arbitration Days, Clyde & Co held an event discussing how climate change considerations can be implemented in common contractual provisions, including public procurement contracts, as well as dispute resolution clauses.

The panel of experts moderated by Georg Scherpf, Head of Arbitration at Clyde & Co Germany consisted of Stuart Bruce, Associate Director, Climate Risk & Decarbonisation Strategy at KPMG London, Phoebe Roberts, Director of Implementation and Co-Lead APAC at The Chancery Lane Project, David Hansom, Partner at Clyde & Co London and Annette Magnussen, Secretary General at the Arbitration Institute of the Stockholm Chamber of Commerce. Each expert gave the audience an insight into their practice area with a particular focus on how climate change risks can impact and reshape the ways in which business is conducted. The message of the event was clear – climate change risks are real and material, and those who prepare now will be able to withstand them. The legal profession is ready to equip their clients with the necessary tools to do so.

Stuart Bruce started the discussion by outlining how companies will need to review contracts and restructure business transactions in response to climate change. Worldwide CEOs rank climate change as one of the top risks on their agenda and company boards are getting more and more concerned about giving a proper consideration to the fight against climate change. Yet climate change risks are unusually complex, multi-dimensional and multi-scale, which makes them difficult to model and manage.

Since climate risks are systematic and large-scale, they will impact all sectors of the economy. For instance, all businesses rely on a stable global climate for the reliable supply of raw materials and safe infrastructure. Yet as the Covid-19 pandemic has proven, supply chains are unusually sensitive to acute impacts. However, climate change risks can be translated into opportunities such as access to new markets driven by changing customer sentiment, provision of solutions to prolonged business interruption in key locations, as well as innovative means of decarbonisation of energy sources. All professions, including lawyers have a role to play in building a climate resilient future.

Phoebe Roberts gave an introduction to the work of The Chancery Lane Project (TCLP), a UK based pro bono initiative that brings legal professionals together to collaborate and rewrite contracts and laws, in order to support communities and businesses in fighting climate change and achieving net zero carbon emissions. TCLP aims to shift dial and make climate-conscious drafting that seems ambitious today a norm as fast as possible. The initiative wants to embed considerations of climate change risk into all areas of law so that climate change is no longer perceived as a discrete environmental issue.

The climate-conscious contractual clauses were drafted during collaborative events called 'hackathons' that TCLP holds on a rolling basis in 2021 to align with the key areas of focus of the upcoming 26th Conference of Parties to the Paris Agreement (COP 26).

The clauses drafted in these hackathons will be published in The Net Zero Playbook in the lead up to COP26 to give corporations practical tools for decarbonising their operations via contracts. So far, TCLP has published more than 70 precedent clauses that are ready to be adapted to any commercial contract and can be accessed via this gallery. These clauses result from a collaboration of 690 legal professionals from 147 law firms and organisations across the world and have been downloaded more than 50,000 times in 12 months. The vision of TCLP clearly echoed throughout the presentation - a world where every contract and law enables solutions to climate change.

Following on from the introduction to TCLP, **David Hansom** took the audience into the realm of supply chain contracts to explain how various contractual clauses can be redrafted to assist clients in their decarbonisation efforts. Supply chain emissions are on average 5.5 times higher than business' direct emissions. With many supply chain contracts being in one way or another linked to public procurement, governments are often best placed to drive change and influence behaviour by inserting climate-conscious clauses into their procurement contacts. Policy makers can set local rules and drive ambitious market standards while, in tender processes, selection criteria linked to CO2 mitigation must be kept proportionate and related to the subject-matter of the contract.

It is crucial to put obligations on not only Tier 1 suppliers and their supply chains. Clauses requiring a supplier to, for instance, monitor, report, mitigate and offset (if mitigation is not possible) its own Scope 1, 2 and 3 emissions have a potential to cascade net zero obligations of a corporation down its value chain reducing the CO2 impact of its operations worldwide.

Globalisation has made supply chains complex and multifaceted, which in turn creates the risk of 'forum shopping' i.e. multinational players establishing themselves in less heavily regulated markets Enforcement of any net zero obligations by way of contractual remedies is crucial for a success of these contractual provisions. If a dispute cannot be resolved amicably between the parties, litigation or arbitration may follow. Arbitral institutions must ensure that their rules and processes are adequate for resolving these novel disputes effectively and efficiently.

Annette Magnussen picked up the conversation right where David Hansom left it to address how climate change contracts could change institutional arbitration. There is no doubt that arbitral institutions can accommodate climate change-related disputes through a variety of currently available rules. Parties can, for instance, secure relevant scientific or technical expertise that reflect the up-to-date knowledge via appointing expert arbitrators to their panel. They can also choose that their dispute be arbitrated under expedited rules to secure speedy resolution or provide an urgent interim relief where needed. By way of an example, at the Stockholm Chamber of Commerce (SCC), more arbitration cases are registered under the Expedited Rules since expeditious and efficient arbitration often enables parties to resume their businesses operations or projects sooner and keep opportunity costs low.

Nevertheless, the unique nature of climate change disputes creates a need for novel amendments to institutional rules and contractual provisions. In the context of climate change supply chain contracts, complex multi-party disputes may arise from a breach of a net zero reporting obligation due to the number of stakeholders involved in global supply chains. Clauses in contracts preventing third parties from bringing parallel proceedings in other fora need to be accompanied by institutional rules allowing for a third party to be joined to the ongoing dispute.

Although many modern arbitral rules do include provisions on joinder, this needs to be also implemented by parallel contractual provisions that would enable consolidation of the issues in dispute before an informed panel of experts while ensuring cost-efficient resolution for all the aggrieved parties.

In addition, climate change disputes - by default - entail public interest, which is often unrepresented under traditional arbitral rules. Allowing for amicus curiae non-party intervention to be made on behalf of interested citizens to provide a special perspective and expertise would increase fairness of the process and public confidence in resolving climate change disputes in private arbitration setting. Finally, climate change disputes also challenge the notion of confidentiality in commercial arbitration settings. By its very definition, confidentiality bars the "climate-related dispute intelligence" generated in one case from being shared beyond the parties to that dispute. However, such intelligence can be invaluable in informing decisions of private and public actors by making them aware of what climate action is already under way, what obstacles have been encountered and how to scale up the efforts. Therefore, the arbitration community may have to revisit the notion of confidentiality in light of the bigger picture of the urgent need to take action – both private and public – to mitigate the impacts of climate change.

The event was well received by all attendees and Clyde & Co is looking forward to continuing this important discussion.

Zaneta Sedilekova

Georg Scherpf

Kick-off Webinar: "Renewables in Turkey – Realising Potential and Mitigating Risks"

Turkey has a significant potential for offshore wind and provides favorable conditions for solar, hydro and geothermal as well.

Our joint kick-off webinar on "Renewables in Turkey – Realising Potential and Mitigating Risks" took place on 6 May 2021 and was organized in collaboration between Clyde & Co and CETINKAYA with a line-up of speakers consisting of external speakers of the Turkish Energy Industry, Industry Associations and several colleagues from the energy and disputes teams of Clyde & Co and CETINKAYA.

The webinar started with an introduction by **Georg Scherpf (Head of Arbitration Germany at Clyde & Co) and Orcun Cetinkaya (CETINKAYA)**. They moderated the webinar and introduced the distinguished speakers and the topics.

Batu Aksoy of Turcas Petrol A.Ş gave a keynote speech on the Energy Landscape in Turkey. He provided interesting insights on the energy transformation in Turkey from an operational, financial and legal perspective. In particular, he recommended to phase down the price subsidization of day ahead market and consecutively, of the end consumer tariff thanks to the state-owned companies such as EUAS and BOTAS, rather define long term targets for the development of the renewable sector to strengthen the incentives of the market mechanisms and provide easier access to financing for large scale energy projects.

In the following, **Murat Durak of DÜRED** (Turkish Offshore Wind Energy Association) provided further insights on Turkey's Potential for Offshore Wind. He explained that both the Aegean Sea and the Marmara Sea have high potential for offshore capacity in Turkey. The most attractive areas for offshore wind lie in the northwest in the Aegean Sea where wind speeds rise to 9 m/s. In total, Turkey has an overall offshore wind potential of 75 GW. Murat Durak further elaborated that there are some important issues when it comes to the planning phase of offshore wind farms in Turkey such as: wind speed, territorial waters, tourism, military areas, civil aviation, maritime traffic, pipelines and underground cable routes.

Özgür Altintas of CETINKAYA gave an overview on the applicable legal framework for renewable energy in Turkey. She elaborated that Turkish law sets the main foundation for the designation and protection of the renewable energy resources (such as wind, solar, geothermal, hydraulic, biomass, wave, current and tidal – "YEK"), certification and subvention of electricity generated from renewable resources and the use of renewable resources. She continued to give useful guidance on dealing with the competent Turkish authorities, i.e. the Ministry of Energy and Natural Resources ("MENR"), the Energy Affairs Directorate under the MENR and the Energy Market Regulatory Authority ("EMRA"). The relevant energy resource areas in Turkey ("YEKA") are determined by the MENR on public/ treasury or private lands. Further, she elaborated on the mechanisms to incentivize renewable energy production in Turkey ("YEKDEM").

Habib Babacan of Nordex Enerji A.Ş shared some of his experience from the Industry: The Turkish government recently declared a new incentive system on 30 January 2021. It includes feed-in tariffs in Turkish Lira, quarterly price adjustments and additional feed-in tariffs for the usage of local components. He particularly focused on explaining the investment cycle between 1998-2007 which raised awareness regarding renewable energy among energy professionals in Turkey. During this time, supporting regulations were introduced by the government.

Georg Scherpf started by providing insights on **Clyde & Co's** capabilities in the power and renewables sector. Clyde & Co regularly advises on all issues that might arise during the project lifecycle of large-scale energy projects starting from the tendering phase, continuing with the execution/installation phase and litigation or arbitration. Further, he provided various insights on resolving disputes during and after the construction phase. Moreover, he explained that Turkey has signed over a hundred Bilateral Investment Treaties ("BITs") of which 76 are currently in force. In case of non-compliance with necessary obligations to protect foreign investments, most treaties signed by Turkey allow the investor to file an arbitration directly against the host state before an international arbitral tribunal. Awards in favor of the investor can be enforced pursuant to the New York Convention or the ICSID Convention. In the last years, Europe has seen a large number of successful claims which invoked a breach of legitimate expectations of foreign energy investors resulting from a radical and unforeseeable change to the underlying legislation (e.g. a revocation of feed-in tariffs). Foreign investors ought to ensure that they are covered by existing protections under international law before investing abroad.

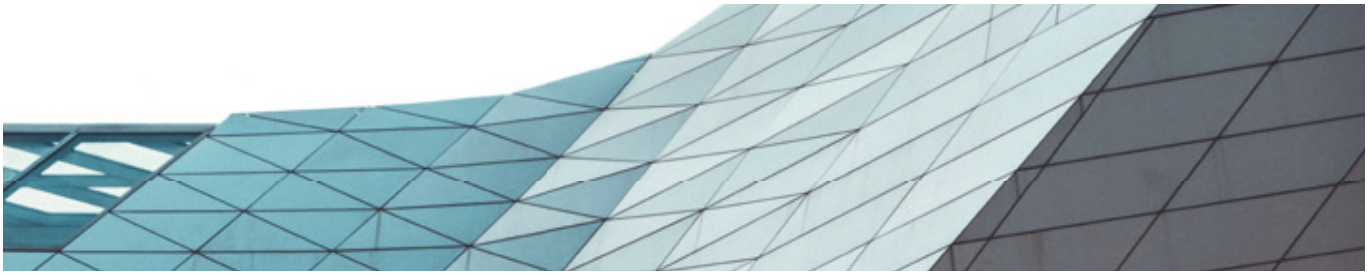
Anna-Sophie Waldmann and Dilara Kamphuis provided an overview on the different legal issues which might arise in offshore construction with a focus on force majeure due to COVID-19, liabilities and indemnities, warranties and passing of risk, risk allocation, variation procedure, scope of CAR insurance, claims handling as well as termination and suspension. They provided some viable options for project management teams to manage the different challenges that arise during the installation phase of an offshore wind farm and how to resolve disputes at an early stage or during the project itself.

The webinar ended with **Volkan Öztürk of YILSAN Yatırım Holding A.Ş.** giving some concluding remarks on "Renewables in Turkey in 10 years". He explained that Turkey has the cheapest wind supply prices worldwide and that solar is a very important resource in Turkey with massive projects and forecasts of fastest growth in Turkey by 2025 – increasing by 208% to 16.9 GW in total. As of now, there are already some solar tenders ongoing such as mini solar YEKA competitions with a capacity of 1000 MW.

In case of any further questions, please make contact with Clyde & Co (Georg Scherpf – **georg.scherpf@clydeco.com** or CETINKAYA (Orcun Cetinkaya – **orcun.cetinkaya@cetinkaya.com**

Dilara Kamphuis

Berk Tüzüner, CETINKAYA



Just-In: Dutch Court orders Shell to reduce carbon emissions by 45%

In a landmark decision published on 26 May 2021, the District Court of the Hague has ordered Royal Dutch Shell to reduce its net CO2 emissions by 45% compared to 2019 levels, with the reduction to be achieved by the end of 2030 at the latest. The case was brought against Shell by environmental groups Milieudefensie (Friends of the Earth Netherlands), ActionAid and others, and was supported by more than 17,000 Dutch citizens. The judgment marks the first time that a corporation has been held to be responsible for reducing its net emissions in line with targets introduced by the Paris Agreement.

The required reduction applies to the emissions produced by Shell's own operations (Scope 1 emissions) as well as the emissions produced by the operations of its suppliers (Scope 2 emissions) and its customers (Scope 3 emissions). In respect of Shell's Scope 1 emissions, this is a "result obligation", meaning the result in question must be achieved; while in respect of its suppliers' and customers' Scope 2 and 3 emissions, this is an "effort obligation", meaning Shell must use best endeavours to achieve the result in question. Furthermore, Shell is being required to make this reduction across the group's global operations.

The Court found that Shell is subject to an unwritten standard of care based on the applicable Dutch Civil Code, which the Court interpreted in line with *"the best available science on dangerous climate change and how to manage it, and the widespread international consensus that human rights offer protection against the impacts of dangerous climate change and that companies must respect human rights"*. The Court referred specifically to the 2019 Urgenda decision establishing that Articles 2 and 8 ECHR offer protection against the effects of climate change; and the UN Guiding Principles on Business and Human Rights.

Notably, when assessing the admissibility of the claim, the Court determined it could not allow the claim in respect of future generations, or of developing countries, but only in respect of the interest of Dutch residents and inhabitants of the Wadden region.

The Court considered that although Shell is not currently in breach of its obligation to reduce its CO2 emissions, its policies are intangible, undefined and conditional; and that there is accordingly a risk that Shell will breach the obligation. Therefore, the Court made an Order to implement the reduction, which is immediately effective, regardless of any appeal.

This case is the latest development in the increasing trend of climate change litigation around the world against major corporations responsible for a high amount of CO2 emissions. Most claimants in climate cases against energy companies to date have typically been seeking damages to compensate for the current and future impacts of climate change (in particular in the current spate of litigation brought by States and municipalities against oil majors in the USA). Milieudefensie, instead, are seeking a change in corporate behaviour. The decision of the Dutch Court may encourage current and future efforts by environmental and public interest groups around the world to bring similar lawsuits.

For further reference on these trends, see Clyde & Co's report Stepping up good governance to seize opportunities and reduce exposure, which explores climate change risks and liabilities faced by organisations around the world; and the report Clyde & Co co-authored with the Geneva Association and the London School of Economics Climate Change Litigation – Insights into the evolving global landscape.

Nigel Brook

Lucia Williams

Neil Beresford

“

A court in the Netherlands has ruled in a landmark case that the oil giant Shell must reduce its emissions.

By 2030, Shell must cut its CO2 emissions by 45% compared to 2019 levels, the civil court ruled.

The Shell group is responsible for its own CO2 emissions and those of its suppliers, the verdict said.

Insight: Clyde & Co

Christoph Pies verstärkt die deutsche Litigation & Arbitration Praxis

Zum 1. April 2021 hat unsere Kanzlei den erfahrenen Prozessanwalt Christoph Pies als Counsel für unsere Litigation & Arbitration Praxis gewonnen. Damit baut Clyde & Co seine Prozesspraxis weiter aus.

Christoph Pies vertritt internationale und nationale Mandanten in komplexen handels-, haftungs- und gesellschaftsrechtlichen Streitigkeiten und Schiedsverfahren. Ein besonderer Fokus seiner Tätigkeit sind Streitigkeiten in den Bereichen internationaler Handel, Infrastruktur sowie Gesellschafterstreitigkeiten.

Vor seinem Wechsel zu Clyde & Co war Christoph Pies Salaried Partner in der Dispute Resolution-Praxis bei Heuking Kühn Lüer Wojtek in Berlin. Seine Karriere als Rechtsanwalt begann er 2013 in der Corporate/M&A-Praxis von Baker McKenzie in Düsseldorf.

Christoph freut sich über seinen Einstieg bei Clyde & Co: *„Die deutsche und internationale Prozesspraxis von Clyde & Co verfügt über exzellente Kompetenz, eine sehr ausgeprägte Spezialisierung und einen starken Branchenfokus. Clyde bietet mir daher ideale Voraussetzungen, meine Beratung in anspruchsvollen handels-, haftungs- und gesellschaftsrechtlichen Streitigkeiten auf einer globalen Plattform fortzusetzen. Ich freue mich sehr darauf, die deutsche und internationale Prozesspraxis von Clyde gemeinsam mit den Teams in Hamburg, München und in unseren Büros weltweit auszubauen und mitzugestalten."*

Dr. Henning Schaloske, Partner und Mitglied des deutschen Executive Teams kündigt an: *"Mit Christoph Pies bauen wir unsere Prozesspraxis zielgerichtet weiter aus. Seit der Eröffnung unseres ersten deutschen Büros in Düsseldorf im Jahre 2016, der Verstärkung unseres deutschen und internationalen Arbitration Teams mit Nadia Darwazeh in Paris, der Eröffnung des Hamburger Büros im Jahr 2019 mit den vier Partnern Dan Jones, Dr. Tim Schommer, Dr. Eckehard Volz und Dr. Volker Lücke sowie zuletzt mit Georg Scherpf als Counsel und der Eröffnung des Münchener Büros im Februar 2021 mit Dr. Sven Förster haben wir auch in Deutschland ein marktführendes, erfahrenes Disputes Team aufgebaut. Unser Ziel ist, für unsere deutschen und internationalen Mandanten damit ein Angebot zu schaffen, das höchste rechtliche Qualität mit wirtschaftlichem Sachverstand und dem nötigen Pragmatismus verbindet – und dies in einem Kanzleiumfeld, das in besonderem Maße global ausgerichtet ist, international denkt und divers zusammengesetzt ist."*

Styliani Ampatzi, Anna Falk und Georg Scherpf sind Gender Champions

Die deutschen Büros von Clyde & Co nehmen gemeinsam an der DIS-ERA Pledge Gender Champion Initiative teil. Aufbauend auf der Arbeit von ERA Pledge hat dieses Pilotprojekt zum Ziel, mehr Diversität in der internationalen Schiedsgerichtsbarkeit herzustellen.

In diesem Rahmen ernennen die teilnehmenden Organisationen sogenannte „Gender Champions", die intern im Wege einer Selbstkontrolle Statistiken zum Frauen- und Männeranteil bei Schiedsrichterernennungen führen. Die Gender Champions tauschen sich in regelmäßigen Telefonkonferenzen mit der DIS und ERA Pledge aus.

Für Clyde & Co übernehmen diese Aufgabe Dr. Styliani Ampatzi und Anna Falk unter Leitung von Georg Scherpf (Head of Arbitration Germany).

Mehr Informationen dazu finden Sie hier.

Virtuelle Vis Moot Veranstaltungen für sechs deutsche Unis

Im März haben wir unser virtuelles Vis Moot Event für sechs deutsche Uni-Teams durchgeführt. Die virtuelle Veranstaltung bestand aus drei separaten Probe-Pleadings und einem Get-Together.

Durch das online Angebot war es möglich, Schiedsrichter aus verschiedenen Büros von Clyde & Co einzubinden. Neben Anwälten aus dem Düsseldorfer und Hamburger Büro waren auch unsere Pariser und Londoner Büros vertreten, sodass ein internationales Tribunal zustande kam. Zum gegenseitigen Kennenlernen fand im Anschluss ein virtuelles Treffen mit allen Teams und verschiedenen Mitarbeitern von Clyde & Co statt.

Wir haben uns sehr gefreut die Teams unterstützen zu können und gratulieren an dieser Stelle noch zu ihren beeindruckenden Erfolgen in Hong Kong und Wien!

Neue Partner

Zum 1. Mai 2020 begrüßten wir im Rahmen der jährlichen Partnerernennung weltweit 16 neue Equity Partner und 13 Senior Equity Partner bei Clyde & Co.

Unsere neuen Partner haben sich durch ihr Engagement und Erfahrung im Markt ausgezeichnet. Von den neu ernannten Partnern sind Vicente Bañuelos Rizo aus dem Büro in Mexico City und Alfred Thornton aus dem Büro in Abu Dhabi im Bereich Arbitration & Litigation tätig.

Events Calendar

- **4 March 2021:** Arbitration Tea Time with Jacomijn van Haersolte-van Hof (Director General of the LCIA), online event organised by Georg Scherpf, Clyde & Co Germany
- **22 March 2021:** The Klein-Klein of Climate Change Contracts. The online event was part of the Hamburg International Arbitration Days and was moderated by Georg Scherpf, Clyde & Co Germany
- **25 March 2021**: Treaty protection: the ultimate tool to safeguard investments in Mexico. The Clyde & Co webinar was organised by Vicente Bañuelos (Mexico City, Mexico), Alejandro García (London, UK) and Georg Scherpf (Hamburg, Germany)
- **6 May 2021:** "Renewables in Turkey - Realising Potential and Mitigating Risks". This joint webinar of Clyde & Co and CETINKAYA provided an overview for investors in renewables in Turkey. It covered the first steps of doing business in Turkey, outlined the support schemes in place and addressed investment protection and dispute resolution. Speakers from Clyde & Co: Georg Scherpf (Head of Arbitration Germany), Dr Eckehard Volz, Dilara Kamphuis, Anna Sophie-Waldmann
- **20 May 2021:** Les défis et opportunités de l'arbitrage en Afrique francophone. The webinar "The challenges and opportunities of arbitration in francophone Africa" was organised by Nadia Darwazeh, Partner, Head of Arbitration Clyde & Co France and Hery Ranjeva, Partner, Clyde & Co France
- **29 June 2021:** Arbitration Tea Time with Francesca Mazza, Secretary General of the German Arbitration Institute (DIS), with whom we will discuss the current challenges to institutional arbitration, joinder and intervention, gender diversity as well as her path to arbitration. Following the interview, participants have the opportunity to ask questions. Francesca Mazza will be interviewed by Anna Falk and Georg Scherpf of Clyde & Co.
- **12-13.08.2021 (14.08.2021 Post Conference Event):** 10. Baltic Arbitration Days 2021 online&onsite, Clyde & Co as Amber Sponsor, FOCUS REGIONS: CEE & EAST ASIA, Georg Scherpf will be participating and presenting as part of the panel on "Investment Arbitration Update", Clyde & Co will host a satellite event on 12 August 2021 on the topic of "Arbitrating Transport & Commodities Disputes" with Anna Falk and Cornelia Kunze of Clyde & Co speaking, further speakers tbd, for more information please visit: Baltic Arbitration Days."

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

Georg Scherpf

Head of Arbitration Germany

georg.scherpf@clydeco.com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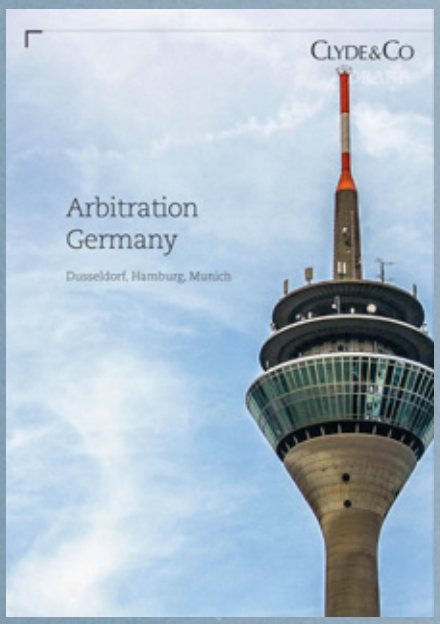
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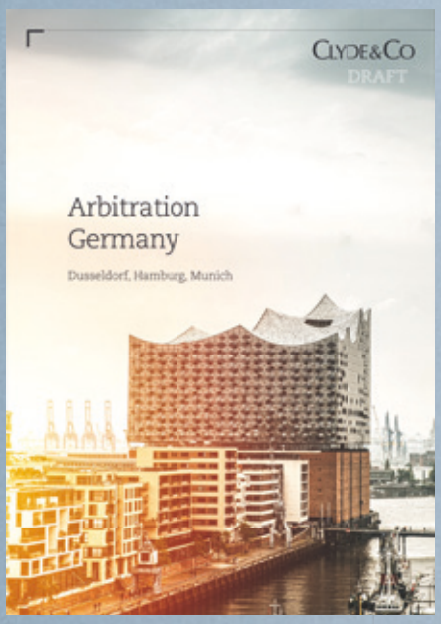
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440

Partners

1,800

Lawyers

4,000

Total staff

50+

Offices*

www.clydeco.com

*includes associated offices

Clyde & Co (Deutschland) LLP trades as Clyde & Co and is a limited liability partnership registered in England and Wales under number OC413029 and with its registered office at The St Botolph Building, 138 Houndsditch, London, EC3A 7AR, United Kingdom. Clyde & Co (Deutschland) LLP is registered in the partnership register of the Amtsgericht Essen under number PR 3857.

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