



this German statute primarily protects consumers, it also applies to B2B contracts. The fact that many M&A contracts are the result of the exchange of and negotiations on standard or semi-standard clauses may cause this German statute to become applicable. Ways to prevent this statute from becoming applicable exist, such as, depending on the circumstances, a choice of non-German law clause (the Swiss escape) or arbitration, as arbitrators are bound to apply the German statute on GTC, but they are not bound by the abundant case law that this statute has given rise to.

Dr. Siegfried ELSING gave a presentation on the calculation of damages in M&A disputes. Firstly, he pointed out that damages may have been incurred by the target company, triggering the question to what extent the purchaser of the shares has suffered any damage. Contractual provisions may deal

with this issue. Secondly, a tension exists between the calculation of damages when "culpa in contrahendo" is invoked as compared to the calculation of damages based on contractual warranty clauses. The "culpa in contrahendo" approach deals with the gap between the purchase price as agreed upon and the hypothetical purchase price.

Finally, Dr. Jörg RISSE chaired a panel of Mr. Ludger KOLLENDER and Dr. Matthias REIF who presented an in-house counsel's view on the use of arbitration for deciding post-acquisition disputes. It was felt that earn out clauses many times give rise to disputes, and a fairly critical statement was made about the fact that the same lawyers may be acting as parties' counsel and as arbitrators, be it in entirely different cases and in entirely different settings.

Report on the 15th Annual IBA International Arbitration Day: "Neutrality: myth or reality?" (Stockholm, 9 March 2012)

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The 15th Annual International Arbitration Day of the International Bar Organisation (IBA) was held in Stockholm on 9 March 2012. Some 550 persons from 52 countries, including 10 Belgians, attended this year's Arbitration Day which was devoted to the topic "Neutrality: Myth or Reality?". After a welcome word by Mark FRIEDMAN (New York) as

Conference Chair and Co-Chair of the IBA Arbitration Committee and by the President of the Swedish Supreme Court, Marianne LUNDIUS, four different panels with a total of 25 speakers focused on different aspects of neutrality in the field of arbitration.



Is the arbitral procedure really neutral?

A first panel chaired by Nathalie VOSER (Zurich) and Eduardo ZULETA (Bogota) and having as speakers Kaj HOBBER (Stockholm), Paula HODGES (London), Eun Young PARK (Seoul) and Eric SCHWARTZ (Paris) focused on the question whether the procedure is really neutral.

Paula HODGES described neutrality as not giving advantage to one party and not acting to the detriment of another party. She described how arbitrators are experiencing increasing pressure to ensure that the arbitral process proceeds efficiently, which includes short deadlines, limited document production and limited witness examinations. She mentioned how arbitrators frequently use a chess clock to separate parties from each other, while adding that this does not always work out very well if the parties' counsels come from different legal cultures and if one party has many more witnesses than the other party. Eun YOUNG PARK stated that language requirements may have a major impact on arbitration proceedings, as in some countries the language of the local institution or of the country is set as the default language of the arbitration. Kaj HOBBER examined the harmonization that has occurred in the field of arbitration through the UNCITRAL Model Law on International Commercial Arbitration (1985 and 2006) and its Arbitration Rules

(1976 and 2010), but also through the International Law Association, the International Council for Commercial Arbitration (ICCA) and the IBA with its Rules on the Taking of Evidence in International Arbitration (1999 and 2010) and its Guidelines on Conflicts of Interest in International Arbitration (2004). He stressed that harmonization is a good thing as it provides a level playing field for the parties and contributes to more confidence in the process and more predictability. Eric SCHWARTZ held that nowadays there is no shortage in neutral places of arbitration. He noted that parties mostly do not choose a law to govern the arbitration proceedings, whilst they very often choose the law to govern their contract. He examined how unexpected local procedural rules may sometimes have an impact on the arbitral process through, e.g., rules on *res judicata*, time bar, reopening an arbitral award, choice of law, consolidation and joinder.

Are arbitrators subject to suspicion?

A second panel chaired by Paul FRIEDLAND and Nayla COMAIR OBEID (Beirut) and having as speakers Donald F. DONOVAN (New York), Peter REES (head of the legal service of Shell in The Hague), David SUTTON (London) and Hans Van Houtte (President of the Iran-US Claims Tribunal in The Hague) debated about the question whether arbitrators are subject to suspicion.



Hans VAN HOUTTE examined what should be done to neutralize intellectual predispositions an arbitrator may have towards the parties or towards a case, and what parties should do to avoid predispositions towards an arbitrator. He stressed that the IBA Guidelines on Conflicts of Interest may be helpful in this respect. David SUTTON spoke about the growing trend in major law firms to make profiles of possible arbitrators. Based on his inquiries with a number of major law firms, he noted that some keep personal databases on potential arbitrators and observed that profiles for arbitrators in investment matters tend to differ from profiles for commercial arbitrators. He concluded that this profiling trend is held invaluable by most law firms and that it works. Donald DONOVAN explored whether the nationality of an arbitrator is relevant in the field of international arbitration, defending it should be irrelevant and should not really influence the outcome of the matter. Peter REES, however, held that there is still a long way to get there and that it is perfectly understandable that parties from new countries entering into the arbitration field prefer arbitrators from their country. Peter



Rees also submitted that the expected impact of co-arbitrators is massively overestimated. Furthermore, he stated that he is in favour of rating arbitrators, while adding that a rating should only be done on the basis of objective facts, such as the time the arbitrator takes to render the arbitral award.

How neutral is the system of investment arbitration?

A third panel chaired by Makhdoom Ali KHAN (Karachi) and Pierre BIENVENU (Montreal) and having as speakers Juan FERNANDEZ ARMESTO (Madrid), Toby LANDAU (London), Christoph SCHREUER (Vienna) and Peter TURNER (Paris) examined the question how neutral the system of investment arbitration is.

Juan FERNANDEZ ARMESTO examined case law and legal doctrine on the question whether it is problematic to act both as counsel and arbitrator in similar types of arbitration. He noted that the Court of Arbitration for Sport (CAS) first released a recommendation in this regard and now prohibits individuals from acting both as arbitrator and counsel in proceedings before the CAS. He supported that there should be no such prohibition in



ICSID investment arbitrations because the challenge of arbitrators is becoming easier. He added that, as states give up their sovereignty to arbitrators in investment arbitrations, it is not certain that investment arbitration will still exist in twenty to thirty years time. Toby LANDAU submitted that it is useful to also sit as arbitrator in investment arbitrations because this gives a person a better insight in how certain issues need to be handled. He presented the text prepared by Alvaro GALINDO (Washington D.C.) and set out that the issue in investment arbitration is not so much the independence of the arbitrator, but the lack of equality between states and private investors. He also underscored that there is a concern about a growing pool of professional arbitrators who only make their living out of being an arbitrator. Since arbitrators in investment arbitration generally need a back office and not all arbitrators have or can afford such back office, it is virtually a small consistent group of people acting as arbitrators in investment arbitrations. Christoph SCHREUER was of a different opinion and held that there are probably less than two dozens of arbitrators in investment arbitrations who can live on their appointments as arbitrator, whilst the vast majority cannot make a living out of that work. He was not convinced of the separation of powers theory in the field and recalled that investment arbitration was created by states who wanted to remove the investment problems from the

political arena to a judicial arena. Christoph SCHREUER also considered that rather than creating a new international appellate body for investment arbitration, it would be a good solution to have a body where preliminary questions with respect to investment matters could be raised, such as the European Court of Justice in Luxembourg. Peter TURNER examined the issue whether the appointment of arbitrators from lists of state designees in ICSID arbitrations causes or contributes to excessive zeal in annulling ICSID arbitral awards, but concluded that he does not know the answer to it. He found, however, that there appear to be more challenges of arbitrators appointed by states than challenges of arbitrators appointed by ICSID.

Do the IBA Guidelines on Conflicts of Interest set the standard or should they be revised?

A fourth and last panel chaired by Judith GILL (London) and having as speakers Doak BISHOP (Houston), Annette MAGNUSSON (Stockholm), Alan REDFERN (London), Anke SESSLER (head of the legal service of Siemens in Munich), Guido SANTIAGO TAWIL (Buenos Aires) and Tore WIWEN-NILSSON (Lund) explored whether the IBA Guidelines on Conflicts of Interest set the standard or whether there is currently a need for revision.

Alan REDFERN held that the IBA Guidelines on Conflicts of Interest only deal with appearances of conflicts of interest, whereas they should focus more



on bias and that the IBA would be brave to rewrite the Guidelines accordingly. Annette MAGNUSSON explained that the Arbitration Institute of the Stockholm Chamber of Commerce uses the IBA Guidelines as one source of inspiration for its work. Doak BISHOP pointed out that Article 14 of the ICSID Convention speaks in the English version of the arbitrator's "independence", whilst the Spanish version speaks of "impartiality". He suggested that Article 14 of the ICSID Convention thus includes both an objective and a subjective test and considered that if the English and the Spanish texts of the ICSID Convention were to be harmonized, this could mean that an arbitrator in an ICSID investment arbitration could sit despite justifiable doubts. Anke SESSLER submitted that the pool of arbitrators who have no conflict of interest is relatively small. Moreover, she found that more and more often arbitrators have a conflict of interest which they only disclose after having been appointed, although they could have known it beforehand. She considers a late disclosure or a failure to disclose as a sign of lack of bias. She regrets that there are no sanctions for arbitrators making a late disclosure of a conflict of interest. Tore WIWEN-NILSSON replied that sanctions are not a matter for the IBA Guidelines on Conflicts of Interest to regulate, but for the local courts or arbitral institutions to

decide upon. With regard to the lists included in the IBA Guidelines, Judith GILL raised the question whether they really work and whether the guidance in relation to matters covered by the orange list really helps. Guido SANTIAGO TAWIL said that the problem with the list is that it cannot be considered on its own. The list is not exhaustive. He observed that many of the situations handled by the ICC in ICC arbitrations are not mentioned in the Guidelines. Doak BISHOP, Alan REDFERN and Tore WIWEN-NILSSON all held that some amendments may be made to the IBA Guidelines, but not many. Alan REDFERN submitted that the estoppel principle and lawyers acting on behalf of insurance companies should be included in the red list as they cannot be considered impartial towards an insurance company. Tore WIWEN-NILSSON said that the conflict issue should be dealt with also from the perspective of academic writings, and that the conduct of arbitrators and repeat appointments of arbitrators also should be further dealt with in the Guidelines.

Final remarks

The Arbitration Day was concluded by Alexis MOURRE (Paris) as Co-Chair of the IBA Arbitration Committee. He indicated that it would be further examined whether the IBA Guidelines on Conflicts of Interest need to be revised.