Message from the Europe Committee

Our Europe Committee launches the new bar year with this special hot topic newsletter on the presentations concerning Austrian, German, Swiss and European law at the ABA/DAV 2013 Frankfurt Conference and an intense agenda for its members in conjunction with the forthcoming October 2013 London Fall meeting of our Section of International Law.

In addition to Continuing Legal Education Programs at the October 2013 London Fall meeting, our leaders of fun—Co-Chair Pat English and Immediate Past Chair Florian Joerg have organized cultural cocktail and dinner events (more on next page and page 25) to accompany the Europe Committee business meeting and breakfast, and the Section Council’s consideration of our Committee’s joint policy initiative on notarization of signatures with the US Lawyers Practicing Abroad Committee.

Look for our monthly calls the first Tuesday of each month at 11 am Washington, DC/5 pm Paris time.

Our Committee is organizing two programs for the New York spring 2014 meeting of our Section, contemplates several teleconference programs, is preparing a Year in Review update on themes of European corporate and financial law as well as European Court of Human Rights rulings, nurturing country/city chapters, and much more!

As we continue with the annual update of our Europe Committee’s business plan for the coming bar year, we warmly welcome outreach from Europe Committee members who would like support in becoming more active volunteers in the work of our Committee.

Patrick Del Duca, Pat English, Wilhelm Zielger
Europe Committee Co-Chairs

A Note from the Editor

This hot topic issue of EUROPE UPDATE recaps some of the presentations and panel discussions that took place at the, “Third ABA/DAV Conference on Transatlantic Deals and Disputes" held in Frankfurt a.M./Germany on June 2-3, 2013, including republishing some of the presentation materials from the conference in the later pages of this issue, as well as several other relevant writings.

I welcome our Europe Committee members who wish to step forward as guest editors to organize further issues such as this one and others posted on the Europe Committee website, as well as editorial staff to assist in the preparation of future issues.

Michael L. Balistreri (michael.balistreri@rhi.com), Vice Chair (Editor)
EUROPE UPDATE

About the Europe Committee

The Europe Committee seeks to engage lawyers conducting practices that touch Europe, including the various European countries, the European Union, and the institutions of the Council of Europe. It nurtures a community of lawyers sophisticated in cross-border matters, comparative law, and the continuously emerging transnational law of Europe, public and private. The Europe Committee’s activities include the sponsorship of programs at the Section of International Law’s seasonal meetings, hot topics teleconferences and newsletter presentations by experts on emerging developments of European law, exploration of legal policy and law reform topics, contribution to the Year in Review issue of The International Lawyer, and co-sponsorship of Section of International Law standalone and other programming.

The Europe Committee’s membership is its most important asset. We encourage all Committee members to be involved in Committee activities and to communicate freely suggestions and ideas.

Upcoming Events

London Fall 2013 Meeting

Programs Co-sponsored by the Europe Committee

October 15
1:00 pm–2:20 pm
The Other Merger: Statutory Mergers and Structuring Opportunities within the EU and Across its Borders

4:30 pm–6:00 pm
Legal Management JEOPARDY: Managing Law Firm Relationships To Avoid Unintended Consequences

October 16
2:30 pm–4:00 pm
Transatlantic Defense Cooperation: Challenges and Opportunities in a New Regulatory and Enforcement Era

4:30 pm–6:00 pm
1) A Family Affair: An International View on Governance, Succession and Dispute Resolution in Family Owned Enterprises
2) Opting Into the UN Convention on Contracts for the International Sale of Goods: Choice of Law in Non-Convention States

October 17
11:00 am–12:30
1) Collective Actions in Europe: Go Directly to London?
4:30 pm–6:00 pm
Merger Control in the EU and US vs. China and Brazil: How Do the Newcomers Compare to Established Jurisdictions?

October 18
2:30 pm–4:00 pm
1) It’s Hard to Say Goodbye: The Do’s and Don’ts of Agency and Distributor Terminations in the European Union
2) The Wave of New Criminal and Regulatory Customs Enforcement Investigations: Current Enforcement Agenda and Outlook for Importers Globally
4:30 pm–6:00 pm

Continued on Page 25
Primer on German Professional Regulations
by Hans-Michael Giesen

I. Sources of law and organization

Essentially the regulations governing admission and supervision of attorneys in Germany (Rechtsanwälte) form part of federal law. The main statute is the Federal Lawyers Act (Bundesrechtsanwaltsordnung – BRAO). It provides for significant elements of self-regulation, both in relation to substance and organizational structure. One important element is constituted by the legislative assembly of the German bar (Satzungsvorstand), which is charged with adopting a general professional regulation supplementing the BRAO (Berufsordnung der Rechtsanwälte - BORA) and a special regulation dealing with the certification of specializations (Fachanwaltsordnung). The members of the legislative assembly are elected by the German lawyers in a written ballot for four year terms, the present one running through June 30, 2015.

Admission to the bar is administered through the 27 regional bar associations (plus a special one for the lawyers exclusively practicing with the German supreme court (Bundesgerichtshof)), i.e. there exist more bar associations than the number of German federal states (16). The regional bar associations administer the admission process and exercise primary disciplinary authority. All of their officers are elected by the member lawyers, not by any other government bodies. The degree of self-regulation of the bar in Germany exceeds that in many other European countries and has been considered an integral aspect of the administration of justice protected under the German constitution.

Decisions by the bar are subject to appeal, in most cases going to special courts where lawyers act as judges. The regional bar is also responsible for supervising its members and sanctioning misconduct, with more severe cases being subject to prosecution by the state prosecutor office and then tried in the criminal courts.

Membership in a regional bar association is mandatory for any lawyer admitted in Germany. In addition, there exist many voluntary bar associations, some of a more general nature, others dedicated to various specialty areas. The most notable voluntary bar association is the Deutsche Anwaltverein (DAV).

Approximately 161,000 lawyers are admitted in Germany.

II. Core values and obligations

As is true in most jurisdictions, independence of the lawyer, observance of strict professional secrecy regulations, diligent exercise of the profession, and the prohibition of representing conflicting interests are considered core values and present the most important obligations of the legal profession. It often comes as a surprise to U.S. lawyers that conflicting interests are limited to those in connection with the “same matter”, i.e. regarding an unrelated matter, a lawyer or law firm, as a regulatory matter, can act against a client – although in real life a lawyer or law firm will think twice before doing so.
III. General developments

As a general statement, over the last 20 years professional regulation in Germany has moved to a more liberal regime. Although lately this tendency has been embraced by large segments of the profession, initially it was much driven by the German constitutional court (Bundesverfassungsgericht) which has struck down many prior existing regulations which it felt were too restrictive in view of the constitutional principle of the free exercise of the profession and, in particular, were not always geared towards protecting clients and the administration of justice but rather furthering privileges of the legal profession. However, there is also a strong sense within the profession and bar leaders that it would be dangerous to follow a distinct *laissez-faire* approach. Rather, in order to justify and maintain the existing high level of self-regulation, there is a broad consensus that this regulation needs to be effective, requiring specific rules and vigorous enforcement. Further, regulation must not favor lawyers over their clients, but rather must be clearly designed to further the administration of justice. One of the aspects being debated in this context is that there exists only a very general obligation of lawyers to participate in continuing legal education (§ 43a subpara. 6 BRAO), but no specific requirements have been set whose fulfillment is monitored by a supervising authority, as is typically the case in the U.S.

**As a general statement, over the last 20 years professional regulation in Germany become more liberal.**

IV. Foreign lawyers practicing in Germany

Under the European Lawyers Act (Gesetz über die Tätigkeit europäischer Rechtsanwälte in Deutschland – EURAG), lawyers admitted in Europe (the EU, Iceland, Liechtenstein, Norway and Switzerland) can practice freely on a fly-in, fly-out basis even without being limited to the law of their home jurisdiction (§§ 25 et seq. EURAG). In doing so they will be treated like a German *Rechtsanwalt* and must, in principle, observe the German professional rules (§ 27 EURAG). Where applicable procedural rules require mandatory representation by a *Rechtsanwalt*, such European lawyers must act together with a German lawyer (*Einvernehmensanwalt* - § 28 EURAG).

Fly-in, fly-out practice by non-European lawyers is not subject to any specific regulations and is accepted without any regulatory concerns as long as such colleagues are not holding themselves out as German lawyers or as practicing German law.

Lawyers admitted in other European jurisdictions covered by the EURAG may become members of the German bar, establish an office in Germany and practice under the name used for the profession in the home country, e.g. *avocat* in case of France (§§ 2 et seq. EURAG). After three years of practice of German law such a lawyer may be admitted as *Rechtsanwalt* (§§ 11 et seq. EURAG). Alternatively, a European lawyer not satisfying the three years German law practice requirement or not admitted in a relevant European jurisdiction, but qualifying for admission in such jurisdiction, may be admitted in Germany after passing a special examination (*Eignungsprüfung* - §§ 16 et seq. EURAG).

A lawyer from a WTO member state practicing law with an education and in a way similar to a German *Rechtsanwalt*, in particular an attorney from the U.S., may establish an office in Germany upon having become a member of the regional bar in Germany, the practice being limited to the law of the lawyer’s home jurisdiction and international law (§ 206 subpara. 1 BRAO). The same applies for non-WTO members if reciprocity is provided (§ 206 subpara. 2 BRAO).

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Professional privilege – In Germany, as in most civil law jurisdictions, attorney-client communication is not *per se* protected, but professional privilege is rather based upon the lawyer’s duty of confidentiality. If such duty is breached with intent, criminal liability applies (§ 203 *Criminal Code – StGB*), but negligence suffices to establish a breach of professional duty (§ 43a subpara. 2 BRAO). The duty also extends to the employees of a lawyer or law firm.

Professional privilege, as defined above, extends to any information which the lawyer has obtained in exercising his or her profession; this is construed broadly, i.e. only private information unrelated to the professional rule is excluded. Some limitations specified by statute apply, e.g. in a context of money-laundering or serious crimes being planned. The person to whom the duty of confidentiality is owed, typically the client, controls it and therefore can waive the professional privilege.

The lawyer has no obligation to testify (§ 53 subpara. 1 no. 3 *Criminal Procedure Code – StPO*) and is protected against search and seizure in relation to files under his or her control (§ 97 StPO), unless waived by the person protected by the duty of confidentiality, typically the client. However, investigating authorities may search and seize attorney-client communications at the client’s or a third party’s premises, except for communications made and documents prepared specifically in the context of the defense – this exception resulting from the constitutional right entitling the accused to an effective defense.

In-house lawyers – Although no specific data is available, one may very roughly estimate that about half of German in-house counsel are admitted to the bar as *Rechtsanwalt*. Under the law presently on the books, a lawyer may not represent his or her employer before courts or arbitral tribunals, if acting as a lawyer rather than a non-lawyer representative in proceedings where no compulsory representation by a lawyer is required (§ 46 subpara. 1 BRAO). The prohibition is further extended to non-litigation type legal work performed for the employer prior to undertaking work in the same matter for the same client in capacity as a lawyer and *vice versa* (§ 46 subpara. 2 BRAO); this also being applicable to all other lawyers associated within the same law firm. As a consequence, professional privilege as described above is understood not to apply to in-house counsel, even if admitted to the bar as a *Rechtsanwalt*, again with the limited exception to protect the right to an effective defense.

These restrictions are based upon the premise that, in relation to the non-law firm employer, in-house counsel is not truly independent and therefore shall not be treated the same way as external legal counsel. However, as a matter of professional policy, this is a hotly debated issue and several proposals have been brought forward to relax the restrictions, at least in relation to work outside of courts and arbitral tribunals.

Alternative business structures – Under the existing regulations, lawyers admitted in Germany may only associate, be it in joint firms or even in the form of office sharing arrangements, with other lawyers, patent attorneys, tax advisers, accountants and certified public accountants (§ 59a BRAO). In principle, this also applies to the foreign equivalents of these professions. Where the form of a corporation (typically a limited liability company – *GmbH* – but possibly also a stock corporation – *AG*) is used as the legal form, only lawyers, patent attorneys, tax advisers, accountants and certified public accountants may be shareholders, and the lawyers must control the majority of capital, votes and management (§§ 59c et seq. BRAO).

There is no intention in Germany at this stage to relax these restrictions, as has happened in some European countries, most notably in the UK. It is not clear yet how this will evolve in practice as to German lawyers associated with firms which outside of Germany are participating in alternative business structures.

(1) This brief overview was inspired by the author’s participation in a panel on cross-border professional ethics at the *Third ABA/DAV Conference on Transatlantic Deals and Disputes* held in Frankfurt a.M., Germany on June 2-3, 2013.
Overview on Swiss Professional Regulations
by Dr. Thomas Rohner, LL.M.

The following provides for a short and general overview on the attorneys' professional rules from a Swiss perspective. It is based on a panel participation and comments of the author at the "Third ABA/DAV Conference on Transatlantic Deals and Disputes" held in Frankfurt a.M./Germany on June 2-3, 2013.

I. Swiss System of Professional Regulations
Several sets of rules regulate professional conduct in Switzerland:

The most important act is the "Swiss Federal Act on the Attorneys' Freedom of Movement" ("FAAFM", "BGFA – Bundesgesetz über die Freizügigkeit der Anwältinnen und Anwälte"). According to Article 2(1) FAAFM, the Act generally applies only in areas of the attorney monopoly, i.e. legal representation before federal and state courts. Article 12 FAAFM states a number of professional duties (such as the professional duty of care, the independence of the attorney, regulations on attorney fees, etc). Article 13 provides for the attorney-client privilege. Further, a supervising authority supervises the attorney (Article 14) and can order several disciplinary measures (e.g. monetary penalty not exceeding CHF 20,000, or a prohibition to practice, temporarily or permanently; see Article 17).

Self-regulation rules need to be considered as well. For instance, the Swiss Bar Association has enacted a code of conduct ("Standesregeln SAV"). They are only binding for SBA members. However, the vast majority of attorneys practicing in Switzerland are SBA members. In addition, the SBA's code of conduct may possibly be used to interpret the attorney's contractual duties of diligence towards his/her client.

Furthermore, professional rules are in place on the cantonal level. Each canton has its own bar association with applicable professional rules. They are often aligned with the FAAFM.

Under Swiss law, the attorney-client relationship and its legal qualification is governed by the Swiss Code of Obligations ("CO") which is a Federal Statute. Such relationship can be qualified as an agency contract pursuant to Article 394 et seqq. CO. The aforementioned Article 12 FAAFM must be considered to determine the agent's duties of diligence, i.e. the attorney's duties towards his or her client.

The Swiss Criminal Code is another relevant Federal Statute. According to Article 321, violations of the attorney-client privilege qualify as a criminal offence. The possible sanction can be prison time of not more than three years, or a monetary penalty.

II. International Context
In an international sphere, it is important to note that according to Article 21 FAAFM, attorneys admitted to the bar in an EU/EFTA state are generally allowed to practice in Switzerland. E contrario, attorneys admitted to the bar in other countries ("Third States") are basically not allowed to practice in the scope of the attorney monopoly.

Under Article 22 FAAFM, the federal or cantonal judicial bodies may ask a foreign attorney to provide evidence of his/her qualification as an attorney.

In proceedings with mandatory representation ("Anwaltszwang", e.g., in certain criminal proceedings [cf. Article 130 CrimPC] or in civil proceedings, if a party is "manifestly unable to appear" [Article 69 (1) CPC]), a foreign attorney must act in correspondence with an attorney registered in a cantonal bar registry (Article 23 FAAFM).

Furthermore, EU/EFTA attorneys need to be aware of Article 25 FAAFM. Under this provision, EU/EFTA attorneys need to comply with the same professional rules of conduct as their Swiss colleagues (Article 12 FAAFM). According to Article 26 FAAFM, the supervisory board in the canton of practice can take disciplinary measures against them, after which it will inform the competent authority in the attorney's state of origin.

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Introduction to the Practice of Law and Ethical Issues in Austria*

By: Barbara Helene Steindl

I. Bar associations and attorney admittance

If attorney is admitted to practice in Austria, attorney may practice in all Austrian provinces and before all courts and authorities. The Austrian head organization for attorneys is the Austrian Bar Association ("Rechtsanwaltskammer"; see www.rechtsanwaelte.at). The Austrian Bar Association is comprised by one bar association (“chamber”, Rechtsanwaltskammer) for each of Austria’s nine provinces (e.g. Vienna Bar Association). Both the below mentioned Attorney’s Regulation and the Guidelines have been issued by the Austrian bar association and are binding for all attorneys admitted in Austria no matter in which province they act or before which court they appear.

II. Austrian rules on professional conduct


Recent changes: Along the lines of the respective EU regulation, introduction of provisions covering attorney’s duties to investigate certain data of clients (e.g. ID, shareholders etc) in case of doubt with respect to money laundering and terrorism-financing offenses potentially committed by a client and related reporting duties of the attorney to the ministry for internal affairs.

Guidelines for attorney practice (”Richtlinien für die Ausübung des Rechtsanwaltsberufes”, „RL-BA“; for original German text see http://www.rakwien.at/userfiles/file/RL-BA.pdf)

III. Insights into the Austrian rules on professional conduct

To the extent an Austrian attorney (“Rechtsanwalt”) acts in Austria (e.g. represents a foreign client before Austrian courts, tribunals sitting in Austria, renders legal advice in Austria). There is no specific regulation on the international applicability of the Austrian attorneys’ Regulation and Guidelines. A person qualifies as an attorney-at-law (Rechtsanwalt) if she or he fulfills all requirements for inclusion in the Austrian register of attorneys and is in fact registered in this list as an attorney (§ 1 Austrian Attorneys’ Regulation). A person qualifies to be included in the list of attorneys she or he (i) is an Austrian citizen (or a EU or Swiss citizen) and over 18 years of age, (ii) completed her or his studies of Austrian law; (iii) has completed the practice required (5 years in total, 3 with an attorney-at-law); (iv) has completed the court practice required (5 months); (v) has successfully passed the bar exam; (vi) has completed the number of legal courses required to take the bar exam.

Neither the Austrian Attorneys’ Regulation nor the Guidelines define what it means to “practice law”, although the term is used. In an Austrian direction, it is, however, defined who qualifies as a "chamber pundit" (Winkelschreiber): Anybody who for money, without qualifying as an attorney-at-law, acts in the name of a party although the proceedings would mandatorily require the representation by an attorney-at-law or who, as her or his continued business, drafts legal documents/deeds or judicial submissions for a party.

The CCBE Code of Conduct applies to Austrian attorneys’ cross-border activities


Article XIV paragraph 2 of the Austrian Guidelines states: “For cross-border activity in the sense of Article...”
1.5 of the CCBE CoC as adopted on 19/05/2006 the lawyer is also subject to these rules in this version.” (Unofficial translation)

Sec. 1.5 of the CCBE Code of Conduct (“CCBE CoC”) defines cross border activities as follows:

(a) All professional contacts with lawyers of EU and European Economic Area Member States other than the lawyer’s own.

(b) The professional activities of the lawyer in a Member State of the EU or the European Economic Area other than his or her own, whether or not the lawyer is physically present in that Member State.

Conflicts of interest defined (Article II Austrian Guidelines)

Austrian attorneys are prohibited from taking on a client or from continuing the representation of a client if client interests may be harmed, as is the case in particular in the following events: (i) If there is a danger to infringe the duty of confidentiality with respect to information; previously received from a client or otherwise received during the previous client’s representation; (ii) If a new client could unfairly benefit from the attorney’s knowledge about the concerns of a previous client; (iii) If a conflict of interest could emerge between two clients (the previous and new client);

(iv) If the independence of the attorney is not ensured towards a client when performing her/his mandate; (v) If during contract negotiations an attorney represents only one side to the negotiations, the attorney may represent this side in a dispute arising out of this contract, either (a) in the event the other side had also been represented in the negotiations by an attorney or (b) in the event that the attorney immediately at the beginning of the contract negotiations expressly declared that she/he was only representing the side of its client; (vi) If an attorney represents a corporation exclusively upon the order of one of the shareholders of the corporation or exclusively on the basis of the information received from one of the shareholders of the corporation, the attorney shall not represent this one shareholder in matters of her/his shareholder relationship if she/he continues the representation of the corporation.

Section 3.2. of the CCBE CoC regulates Conflict of Interest as follows:

3.2.1. A lawyer may not advise, represent or act on behalf of two or more clients in the same matter if there is a conflict, or a significant risk of a conflict, between the interests of those clients.

3.2.2. A lawyer must cease to act for both or all of the clients concerned when a conflict of interests arises between those clients and also whenever there is a risk of a breach of confidence or where the lawyer’s independence may be impaired.

3.2.3. A lawyer must also refrain from acting for a new client if there is a risk of breach of a confidence entrusted to the lawyer by a former client or if the knowledge which the lawyer possesses of the affairs of the former client would give an undue advantage to the new client.

3.2.4. Where lawyers are practicing in association, paragraphs 3.2.1 to 3.2.3 above shall apply to the association and all its members.

Fee sharing with non-lawyers

Fee sharing between attorneys and non-lawyers is not allowed, apart from non-lawyers who are descendents or widow(er)s of a former attorney who was a shareholder of the law firm (§ 21 c Austrian Attorneys Regulation applies in conjunction with § 27 Guidelines). Fees can also be shared with EU attorneys registered in Austria.

Pursuant to section 3.6.1 of the CCBE CoC, fee sharing...
with non-lawyers is likewise prohibited, if the association between the lawyer and non-lawyer is prohibited by the attorney rules of conduct of the attorney’s home state:

3.6.1. A lawyer may not share his or her fees with a person who is not a lawyer except where an association between the lawyer and the other person is permitted by the laws and the professional rules to which the lawyer is subject.

Another interesting point on attorneys’ fees – no pacta de quota litis: Austrian attorneys may agree on success fees (e.g. a 30% addition to a base rate in case of success); however, Austrian attorneys are prohibited from e.g. “financing” a litigation for a client by agreeing on a fee which presents part of the amount awarded to the client (§ 16 Austrian Attorneys Regulation; “prohibition of quota litis agreements”).

Pacta de quota litis are likewise prohibited pursuant to section 3.3 of the CCBE CoC.

3.3.1. A lawyer shall not be entitled to make a pactum de quota litis.

3.3.2. By “pactum de quota litis” is meant an agreement between a lawyer and the client entered into prior to final conclusion of a matter to which the client is a party, by virtue of which the client undertakes to pay the lawyer a share of the result regardless of whether this is represented by a sum of money or by any other benefit achieved by the client upon the conclusion of the matter.

3.3.3. “Pactum de quota litis” does not include an agreement that fees be charged in proportion to the value of a matter handled by the lawyer if this is in accordance with an officially approved fee scale or under the control of the Competent Authority having jurisdiction over the lawyer.

Confidentiality issues that form basis of privilege: what about in house lawyers?

Austrian attorneys-at-law must keep confidential: the matter they have been entrusted with by the client and all information related thereto and, e.g. Austrian attorneys-at-law cannot be forced to testify on such matters before Austrian courts/authorities (§9.2 Austrian Attorneys Regulation).

9.2 The attorney-at-law is obliged to secrecy about the matters entrusted to him and about other facts that become known to him during his professional activities, to the extent that such secrecy is in the interest of his party. The attorney has a right to secrecy in judicial and other proceedings before authorities in accordance with the procedural rules.

However, as Austrian law does not include production of documents, Austrian law (including the Attorneys’ Regulation and Guidelines) neither provides any regulations on or exceptions to privilege or for specific remedies in case an attorney’s professional confidentiality is broken. Section 2.3 of the CCBE CoC (“Confidentiality”) neither regulates privilege issues but deals with confidentiality as follows:

2.3.1. It is of the essence of a lawyer’s function that the lawyer should be told by his or her client things which the client would not tell to others, and that the lawyer should be the recipient of other information on a basis of confidence. Without the certainty of confidentiality there cannot be trust. Confidentiality is therefore a primary and fundamental right and duty of the lawyer. The lawyer’s obligation of confidentiality serves the interest of the administration of justice as well as the interest of the client. It is therefore entitled to special protection by the State.

2.3.2. A lawyer shall respect the confidentiality of all information that becomes known to the lawyer in the course of his or her professional activity.

2.3.3. The obligation of confidentiality is not limited in time.

2.3.4. A lawyer shall require his or her associates and staff and anyone engaged by him or her in the course of providing professional services to observe the same obligation of confidentiality.

The Austrian Attorneys Regulation and Guidelines do not apply to in house lawyers. In house lawyers do not qualify as attorneys-at-law within the meaning of the Attorneys Regulation and Guidelines. This is due to the
fact that under § 5 of the Guidelines:

“If the attorney-at-law’s occupation would also include active ties that belong to the tasks an attorney-at-law is entitled to do (i.e. legal advice, legal representation etc), an attorney-at-law is only entitled to enter employment with another attorney-at-law or with an association of attorneys.”

Therefore, Austrian in house lawyers have no right to privilege.

Non-lawyer ownership of law firms
Only attorneys (or their spouses, descendants, former attorneys who resigned and whose firm is continued by the other partners, widow(er)s and descendants of a predeceased attorney, private foundations if their exclusive purpose is the support of the latter persons) may be shareholders of Austrian based law firms (§ 21 c Austrian Attorneys’ Regulation).

Associations for the exercise of the legal profession of attorneys-at-law between attorneys and non-attorneys are subject to the Austrian Regulation and the Guidelines. (§ 25 c Austrian Attorneys’ Regulation).

An attorney-at-law may enter into an association for the practice of law or continue such association in case of non-lawyers only with the non-lawyers mentioned in § 21 c Austrian Attorneys’ Regulation. (§ 26 c Austrian Attorneys’ Regulation).

The Austrian Attorneys Regulation and Guidelines do not apply to in house lawyers

The same applies to an Austrian attorney representing a client before a US court.

Are licensed foreign lawyers / legal consultants admitted to practice in Austria?

Licenses Swiss and EU attorneys can be admitted as attorneys in Austria if they (i) have practiced with an Austrian attorney-at-law for three years or pass a qualifying examination; and (ii) if the legal studies they have completed in Switzerland or the EU are comparable to the study of law in Austria. Otherwise, Swiss and EU licensed attorneys can be registered as “EU attorneys” in Austria, however, they must cooperate with an Austrian attorney to the extent that attorney-representation is required before the Austrian courts. Other “internationally active” attorneys may act in Austria to advise on the national law of their home jurisdiction.
only (§ 40 EIRAG; for EIRAG, see http://www.rakwien.at/userfiles/file/Service/Standesrecht/eirag_2008_01_01_2.pdf).

§ 41 For such business (§ 40 ELRAG), international attorneys are entitled to be present in Austria for a limited period of time only upon request of the party they represent for the performance of a specifically defined service in Austria.

§ 42 Internationally active attorneys shall use the professional title that they are allowed to bear pursuant to the law of their home state, with a reference to the place of admittance and to the bar association to which they are a member in their home state.

§ 43 The denomination “internationally active attorney” referred to in this law may not be used as a professional title or in advertisement.

The Austrian Attorney Regulations and Guidelines do not limit the substantive law on which Austrian attorneys are allowed to advise [nor] the geographic area in which... [they] advise

Ability of lawyer from outside jurisdiction to appear in an arbitration in Austria
There is no restriction, apart from § 41 EIRAG, since the Austrian Civil Procedure Code does not require parties of arbitration proceedings to be represented by qualified Austrian attorneys.

Advertising issues
§ 10.5 Austrian Attorneys’ Regulations and § 45 of the Guidelines allow advertisement by attorneys by providing:

§ 10.5 Attorneys-at-law are only allowed to advertise to the extent that such advertisement informs about her or his professional activity in a true and factual way and is in accordance with her or his professional duties.

§ 45.1 The attorney-at-law shall essentially advertise through the quality of her or his legal performance.

Advertisement is permissible to the extent it is true, factually, in accordance with the reputation and the prestige of the profession, the professional duties as well as the function of the attorney-at-law within the judicial system. It is impermissible to advertise in particular situations as follows: a) through self-puffery by blatant advertisement; b) through comparative advertisement comparing to other attorneys-at-law; c) through the acquisition of mandates by taking advantage of emergency situations; d) through making available powers of attorney to third persons for the transfer to an undetermined group of people; (d) through disclosing a client without its approval; and e) through referral to numbers reflecting turnover or other success.

The CCBE CoC regulates legal advertising as follows in Section 2.6 Personal Publicity:

2.6.1. A lawyer is entitled to inform the public about his or her services provided that the information is accurate and not misleading, and respectful of the obligation of confidentiality and other core values of the profession.

2.6.2. Personal publicity by a lawyer in any form of media such as by press, radio, television, by electronic commercial communications or otherwise is permitted to the extent it complies with the requirements of 2.6.1.

IV. In particular: Rules of professional conduct and international arbitration
1. Problematic areas concerning attorney conduct and international arbitration:
Preparation of witnesses
Cf. § 8 Austrian RL-BA: Der Kontakt mit Zeugen vor und auch während eines anhängigen Verfahrens ist zu lässig, jedoch muss jede Form der unzulässigen Beeinflussung vermieden werden. [English working translation of § 8 RL-BA: Contacting witnesses before or
during pending proceedings is admissible, however, any form of undue influence must be avoided. § 8 RL-BA also applies to arbitration proceedings.

For clarification purposes, some case law on this provision: Attorneys shall even avoid the appearance of undue influence of a potential witness. This does not prohibit attorney to speak with witness in relation to topics to be covered by its witness testimony and to hear what the witness has to say on those topics. Based on such restrictions, in Austrian practice, witnesses are regularly prepared but not coached.

Any person may be a witness or an expert witness in the arbitration. It is not improper for a party, its officers, employees, legal advisors, or counsel to interview witnesses, potential witnesses, or expert witnesses. (Cf. Article 25.2 of Swiss Rules of International Arbitration)

Apart from arbitrators’ consideration of counsel conduct in arbitration, the effect of these provisions questionable when it comes to designated regulator of attorney conduct in Switzerland and elsewhere. Under Swiss attorney regulations, attorneys are not allowed to influence witness – however, rule does not apply to international arbitration.

Subject to the mandatory provisions of any applicable law, it shall not be improper for any party or its legal representatives to interview any witness or potential witness for the purpose of presenting his testimony in written form or producing him as an oral witness. (Cf. Article 20.6 of the 1998 LCIA Arbitration Rules)

Apart from arbitrators’ consideration of counsel conduct in arbitration, the effect of these provisions questionable when it comes to designated regulator of attorney conduct in the UK and elsewhere. English Solicitors’ Code of Conduct and the Bar’s Code of Conduct essentially do not allow witness preparation / witness coaching (Leveson, David Cameron) but merely permit theoretical explanation how questioning of witnesses will work before tribunal/court.

Therefore, in UK practice, witnesses are regularly coached.

Re: Cf. ABA / ICDR international commercial arbitration Rules. New York State Bar Association’s Rules of Professional Conduct (based on ABA Model Rules) do not specifically regulate the subject of witness preparation and witness coaching. As a result, witnesses are regularly coached in a comprehensive way.

- Other problematic areas to be aware of are distinctions in the following: Depositions, Attorney-client privilege, Requests to produce/ discovery, Independence of attorneys serving as arbitrators

2. How are those ethical problems generally dealt with in international arbitration?

In the HEP decision, a party’s counsel pertaining to the same chambers as the presiding arbitrator (and thus raising a conflict) was refused by an ICSID Tribunal. This refusal was inter alia based on the principle that arbitrators shall safeguard the integrity of the proceedings and are empowered to decide questions of procedure to the extent they are not explicitly dealt with by the applicable arbitration rules. (Cf. Hrvatska Elektroprivreda, d.d. vs. The Republic of Slovenia (ICSID Case No. ARB/05/24) Tribunal’s Ruling regarding the participation of David Mildon QC in further stages of the proceedings of 6 May 2008).

New 2013 Vienna Arbitration Rules (Arbitration rules of the Vienna International Arbitral Centre; see www.viac.eu) do not speak to ethics of counsel in international arbitration. However, Article 37 may be of some effect if tribunal wants to sanction unethical counsel conduct: Unless the parties have agreed otherwise, the arbitral tribunal shall decide on the allocation of costs in its own discretion.

2012 ICC Arbitration Rules (see www.iccwbo.org) do
not speak to ethics of counsel in international arbitration. An ICC Task Force on counsel ethics in international arbitration will be established this year. Article 37.5 may be of some effect if tribunal wants to sanction unethical counsel conduct: *In making decisions as to costs, the arbitral tribunal may take into account such circumstances as it considers relevant, including the extent to which each party has conducted the arbitration in an expeditious and cost-effective manner.*

The draft 2013 LCIA Arbitration Rules (Arbitration rules of the London Court of International Arbitration) do speak to ethics of counsel in international arbitration in the rules and their annex:

*In compliance with its general obligation to participate in the arbitration in good faith, each party shall seek to ensure that its legal representatives shall comply at all times with the general guidelines contained in the Annex to the LCIA Rules. (Article 18.5)*

*In the event of a complaint by any party against a legal representative to the Arbitral Tribunal or upon its own initiative, the Arbitral Tribunal may consider (after consulting the parties and granting that representative a reasonable opportunity to comment upon the allegation against him) whether or not he has engaged in a serious or persistent violation of the general guidelines and, if such violation is found by the Arbitral Tribunal, it may order that legal representative to be excluded from the arbitration, in whole or in part. (Article 18.6)*

Issues covered by the Annex to the LCIA Rules (including 90 paragraphs, called “General Guidelines for the Parties’ Legal Representatives”) include the following:

Para 1: Sphere of application and loyalty to party as primary obligation of counsel. Guidelines do not prevail over mandatory laws, professional rules, codes of conduct that may otherwise apply.

Para 2: Counsel duties before tribunal to be discharged with integrity, honesty and efficiency. Counsel shall abstain from producing unnecessary delay, expense, tactical challenges to arbitrators or to their jurisdiction or from obstructing arbitration or finality of award.

Para 3: Counsel shall act in good faith and shall maintain dignity of the process and compliance of her/his party with tribunal’s orders.

Para 4: Counsel should act with courtesy and respect towards tribunal and other counsel and institution.

Para 5: Counsel should not knowingly make false statement to tribunal or institution.

Para 6: Counsel should not assist in presentation or rely upon false evidence to tribunal or institution.

Para 7: Counsel should not knowingly conceal or assist in concealment of document ordered to be produced by tribunal.

Para 8: Counsel should not (attempt to) initiate unilateral communication on the arbitration with the tribunal or the institution.

Para 9: In case of serious or persistent violation of these Guidelines, tribunal may consider exclusion of representative from the arbitration.

**[In] Austrian practice, witnesses are regularly prepared but not coached.**

In 2008, the IBA Arbitration Committee established its “Task Force on Counsel Conduct in International Arbitration” which published the final version of the guidelines on 25 May 2013. Those guidelines only apply if counsel, tribunals and parties “opt in”.

The IBA Guidelines on Party Representation in International Arbitration regulate the following issues: Application of Guidelines, Party Representation, Communications with Arbitrators, Submissions to the Arbitral Tribunal, Information Exchange and Disclosure, Witnesses and Experts, Remedies for Misconduct.
Use of ADR in commercial disputes, a quiet revolution?
by Anna Engelhard-Barfield and Carl-Christian Thier

This question was posed to a panel consisting of two private practice attorneys, an in-house counsel, and an ICC representative at the recent ABA/DAV Conference in Frankfurt, Germany, June 3, 2013.

Criticism of commercial arbitration has increasingly grown due to long cycle time/duration and high costs. What was originally considered a beneficial alternative to slow and expensive litigation, is now often questioned and criticized as more of the same: a long and expensive process, extensive pleadings, voluminous written statement statements, multiple battling experts, high arbitration fees, high expert fees, high attorney fees - and in the end, a ruling which cannot be appealed. Most of the cost and delay seem to be caused by discovery, motions, and large panels of experts.

Parties have started looking for alternative means of dispute resolution and are turning to mediation; the ADR vehicle which has taken a reluctant root in Germany and other European countries. Recent European surveys indicate that between 1997 and 2011, Fortune 1000 companies increased their participation in mediation and arbitration.

Status of ADR and Mediation in Europe

There is still a vast difference between the US, UK, and Europe when it comes to ADR and mediation. At the annual ICC Mediation Conference in 2012, one contribution was entitled, "The inside track - how blue chips are using ADR". GCs and Heads of Litigation complained about having to overcome hurdles before European parties would agree to mediation. Some of the quotes from this panel included “…mediation was considered not acceptable; not part of the culture”; "they would run into a European view that any process that may have had its genesis in the United States is probably not very good" (Head of Worldwide Litigation, Multinational); “it was sad that some lawyers appeared more interested in fees than settling cases" (Head of UK Litigation, Financial Services). Interestingly, the same litigator stated they "always involve external lawyers... in mediation and they are heavily involved in the strategy, the tactics and the actual delivery of what happens at the mediation".

Dr. Alexander Steinbrecher, the in-house counsel for Bombardier stated at the ICC Conference, "the only people who benefit from litigation are outside counsel"; and, "external counsel never recommends mediation". Dr. Steinbrecher made a case for businesses resolving business problems as business problems: a commercial mindset to avoid escalation of the conflict, realistic cooperation with external counsel, and a clear provisioning for risks and opportunities. Dr. Steinbrecher conceded that mediation is not magic and does not work for all disputes, but that it may bridge the gap between negotiation and litigation - possibly more effectively than arbitration.

The ICC reports a mediation settlement rate of 80% when a first meeting of the parties with a mediator took place prior to the mediation conference. Average cost is quoted as $20,000.00 with an average duration of four (4) months. Multi-party mediations are common. The challenges to mediation were described by the ICC rep-

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representative as follows: 1. mediation is considered exotic outside the US/UK; 2. geographic distance; 3. cultural and legal differences; 4. selection of independent and competent mediator; 5. risk of manipulation of the mediator/mediation, and; 6. combination of mediation with arbitration.

There is no question that arbitration is expensive and requires significant amounts of work by the participants. In a 200+ million Euro arbitration case the defendants had spent millions of Euros in attorney fees, expert fees, and ancillary expenses before the hearing had even begun. There were several rounds of pleadings, multiple experts and thousands of document pages.

In a recent US-German case, the claimant wished arbitration regarding an amount of $130,000. The claimant had to pay $30,000 in initial filing and attorney fees before the respondent even received the complaint. The other party refused to pay their share of the fees, and the arbitrator demanded that the claimant made a payment of ca. $15,000 before he would even start considering the matter. Not surprisingly, the claimant decided to settle for $5,000. Like litigation, arbitration requires payment of proceeding filing costs and payment of attorney fees. Additionally, arbitration proceeding filing costs are usually much higher than initiating a court proceeding, and usually include a significant deposit towards the arbitrator and arbitration panel fees. If one party fails to pay its share, usually the respondent, the claimant is often forced to advance all arbitration costs and deposits if the claimant wishes to proceed. These factors can clearly make arbitration a much more expensive proposition than traditional litigation.

**Improvements of Arbitration procedures**

The longer arbitration takes, the more it cost. However, some improvements have been implemented. Recent practice developments have allowed for optional expedited procedures (JAMS, 2010) and increased arbitration management by agreement of the parties. Revisions to the ICC and Swiss rules on arbitration took effect in 2012; each with the primary goal of improving the efficiency of arbitration proceedings in terms of time and cost.

**Criticism of commercial arbitration has increasingly grown due to long cycle time/duration and high costs.**

Parties can agree on limiting discovery (as to how much and what kinds), how many depositions should be allowed, how long the hearing should last, how much time should be spent on witness testimony (direct and cross), whether a court reporter should be retained (useful for post-hearing briefs), and how many experts will be allowed. For example, the parties could agree to jointly retain an expert for a particular technical issue, or to utilize an "expert witness panel" (simultaneous testimony of experts who can comment on each other's opinion).

It seems that the most important step towards limiting arbitration cost exposure is cooperation between the parties and the arbitrators and an early and comprehensive preliminary conference to establish an overall time schedule with specific provisions for discovery and an early exchange of witness lists and exhibits. Arbitration is not litigation. Unnecessarily disputing facts and documents, throwing reams of paper at the other side, insinuating low-brow motives and false accusations, making unreasonable demands and utilizing other litigation tactics have no place in arbitration or mediation - the alternative dispute resolution vehicles.

Short, concise pre-hearing briefs are helpful to focus the arbitrators on the issues to be resolved. Oral arguments should provide a road map for the tribunal, but be on point.
Pressure from In-house Counsel

In-house counsel are already demanding a more streamlined approach to litigation costs from outside law firms. The same is true for arbitration. Lengthy arbitration may be financially beneficial to the attorney, but is certainly not financially beneficial to the client. Attorneys should have the best interest of their clients in mind and should strive to resolve issues at the lowest overall cost for the client. Repeat business from a client will more than make up for the "lost" business of avoided arbitration or extensive arbitration or court proceedings.

Options for Practitioners

What if attorneys were to dare recommending mediation? Should they be concerned about the "lost" business or should they make every effort to represent the client to the best of their ability, including a thorough preparation for the mediation conference? We can assume that in-house counsel will not be fooled and will take their business elsewhere. There is money to be made in mediation; strategy and tactics planning, collecting facts and figures, as well as effective delivery at the mediation - with the chance to develop a mutually agreeable solution while preserving the business relationship.

There is no question that attorneys need to reassess arbitration as an alternative to litigation. New arbitration rules hint at future developments leading to a more efficient arbitration process and overall cost savings. Whether arbitration can be truly streamlined will depend on the willingness of the parties to work towards a mutual financially reasonable resolution process, without getting lost in billable hours. At the same time, mediation deserves to be reassessed by European attorneys. If business calls for resolving business problems as business problems, not legal problems, the legal community should listen and take action. Business lawyers are certainly familiar with a commercial mindset; balancing the need for risk assessment with the wisdom of realistic cooperation.

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The draft 2013 LCIA Arbitration rules & the 2013 IBA Guidelines on Party Representation in International Arbitration *

By: Barbara Helene Steindl

Introduction

This article provides the author’s updates on both the draft 2013 LCIA Arbitration rules & the 2013 IBA Guidelines on Party Representation in International Arbitration as it relates to ethical obligations (author’s emphasis retained).

I. Draft 2013 LCIA Arbitration Rules

The issue of ethics of counsel in international arbitration is addressed in both the rules and their annex.

Articles 18.5 and 18.6 set forth the obligations and enforcement measures as to participation by legal counsel.

In compliance with its general obligation to participate in the arbitration in good faith, each party shall seek to ensure that its legal representatives shall comply at all times with the general guidelines contained in the Annex to the LCIA Rules. (Article 18.5). In the event of a complaint … or on its own initiative, the Arbitral Tribunal may consider (after consulting the parties and … opportunity to comment upon the allegation against him) whether or not he has engaged in a serious or persistent violation of the general guidelines and, if such violation is found by the Arbitral Tribunal, it may order that legal representative to be excluded from the arbitration, in whole or in part (Article 18.6).

The Annex to the LCIA Rules includes 9 paragraphs, called “General Guidelines for the Parties’ Legal Representatives” that address the following issues (in order):

1. Loyalty to party as primary obligation of counsel. Guidelines do not prevail over mandatory laws, professional rules, codes of conduct that may otherwise apply;

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2. Counsel duties before tribunal to be discharged with integrity, honesty and efficiency. Counsel shall abstain from producing unnecessary delay, expense, tactical challenges to arbitrators or to their jurisdiction or from obstructing arbitration or finality of award;

3. Counsel shall act in good faith and shall maintain dignity of the process and compliance of her/his party with tribunal’s orders;

4. Counsel should act with courtesy and respect towards tribunal and other counsel and institution;

5. Counsel should not knowingly make false statement to tribunal or institution;

6. Counsel should not assist in presentation or rely upon false evidence to tribunal or institution;

7. Counsel should not knowingly conceal or assist in concealment of document ordered to be produced by tribunal;

8. Counsel should not (attempt to) initiate unilateral communication on the arbitration with the tribunal or the institution; and

9. In case of serious or persistent violation of these Guidelines, tribunal may consider exclusion of representative from the arbitration.

Guidelines do not prevail over mandatory laws, professional rules, codes of conduct that may otherwise apply

II. 2013 IBA Guidelines on Party Representation in International Arbitration

The Guidelines are not intended to undermine either a Party representative’s primary duty of loyalty to the party whom he or she represents or a Party representative’s paramount obligation to present such party’s case to the Arbitral Tribunal.

Party Representation

4. Party Representatives should identify themselves to the other Party [] and the Arbitral Tribunal at the earliest opportunity. A Party should promptly inform the Arbitral Tribunal and the other Party [] of any change in such representation.

5. Once the Arbitral Tribunal has been constituted, a person should not accept representation of a Party in the arbitration when a relationship exists between the person and an Arbitrator that would create a conflict of interest, unless none of the Parties objects after proper disclosure.

6. The Arbitral Tribunal may, in case of breach of Guideline 5, take measures appropriate to safeguard the integrity of the proceedings, including the exclusion of the new Party Representative from participating in all or part of the arbitral proceedings.

Communications with Arbitrators

7. Unless agreed otherwise by the Parties, and subject to the exceptions below, a Party Representative should not engage in any Ex Parte Communications with an Arbitrator concerning the arbitration.

8. It is not improper for a Party Representative to have Ex Parte communications in the following circumstances: before nomination / appointment or for nomination of presiding arbitrator only.

Submissions to the Arbitral Tribunal

9. A Party Representative should not make any knowingly false submission of fact to the Arbitral Tribunal.
10. In the event that a Party Representative learns that he or she previously made a false submission of fact to the Arbitral Tribunal, the Party representative should, subject to countervailing considerations of confidentiality and privilege, promptly correct such submission.

11. A Party Representative should not submit Witness or Expert evidence that he or she knows to be false. If a Witness or Expert intends to present evidence that a Party Representative knows or later discovers to be false, such Party Representative should promptly advise the Party whom he or she represents of the necessity of taking remedial measures and of the consequences of failing to do so. Possible remedial measures

(a) advise the Witness or Expert to testify truthfully; (b) take reasonable steps to deter the Witness or Expert from submitting false evidence; (c) urge the Witness or Expert to correct or withdraw the false evidence; (d) correct or withdraw the false evidence; or (e) withdraw as Party Representative if the circumstances so warrant.

12. When Document production, a Party Representative should inform the client of the need to preserve, so far as reasonably possible, Documents.

13. A Party Representative should not make any Request to Produce, or any objection to a Request to Produce, for an improper purpose, such as to harass or cause unnecessary delay.

14. A Party Representative should explain to the Party the necessity of producing, and potential consequences of failing to produce.

15. A Party Representative should advise the Party to take, and assist such Party in taking, reasonable steps to ensure that: (i) a reasonable search is made for Documents that a Party has been ordered, to produce and (ii) all nonprivileged, responsive Documents are produced.

16. A Party Representative should not suppress or conceal, or advise a Party to suppress or conceal, Documents that have been requested by another Party or that the Party has undertaken, or been ordered, to produce.

17. If, during the course of an arbitration, a Party Representative becomes aware of the existence of a Document that should have been produced, but was not produced, such Party Representative should advise the Party of the necessity of producing the Document and the consequences of failing to do so.

**Witnesses and Experts**

18. Before seeking any information from a potential Witness or Expert, a Party Representative should identify himself.

19. A Party Representative should make any potential Witness aware that he or she has the right to inform or instruct his or her own counsel about the contact and to discontinue the communication with the Party Representative.

20. A Party Representative may assist Witnesses in the preparation of Witness Statements and Experts in the preparation of Expert Reports.

21. A Party Representative should seek to ensure that a Witness Statement reflects the Witness’s own account of relevant facts, events and circumstances.
22. A Party Representative should seek to ensure that an Expert Report reflects the Expert’s own analysis and opinion.

23. A Party Representative should not invite or encourage a Witness to give false evidence.

24. A Party Representative may, [ ] meet or interact with Witnesses and Experts in order to discuss and prepare their prospective testimony.

25. A Party Representative may pay, offer to pay, or acquiesce in the payment of: (a) expenses reasonably incurred by a Witness or Expert in preparing to testify or testifying at a hearing; (b) reasonable compensation for the loss of time incurred by a Witness in testifying and preparing to testify; and (c) reasonable fees for the professional services of a Party-appointed Expert.

**Remedies for Misconduct**

26. If the Arbitral Tribunal, after giving the Parties notice and a reasonable opportunity to be heard, finds that a Party Representative has committed Misconduct, the Arbitral Tribunal, as appropriate, may: (a) admonish the Party Representative; (b) draw appropriate inferences in assessing the evidence relied upon, or the legal arguments advanced by, the Party Representative; (c) consider the Party Representative’s Misconduct in apportioning the costs of the arbitration, indicating, if appropriate, how and in what amount the Party Representative’s Misconduct leads the Tribunal to a different apportionment of costs; or (d) take any other appropriate measure in order to preserve the fairness and integrity of the proceedings.


*Editor's Note: This article is my consolidation of the author's slides from her participation on the panel entitled: “NAVIGATING CROSS-BORDER PROFESSIONAL ETHICS: THE LEGAL TERRAIN”.

**Panel Summary: CISG– Europe vs. The Rest of the World**

By: Anika Keswani

The 1980 UN Convention on Contracts for the International Sale of Goods (CISG) has been tremendously successful, at least in the sense that the uniform sales law has been adopted by almost all relevant trading nations except the UK and Brazil. The US, Russia and the former Soviet states, China and almost all of Europe are member states. The EU Commission recently proposed a separate uniform European sales law. Though in early draft stages, this law would cover both consumer and commercial contracts and take effect in 2015 at the earliest. However, given the current interplay between national sales laws of EU Member states plus the CISG, another law could be redundant, confusing, and unnecessary. Panelists agreed the new law should be clearly distinguished, with draft versions carefully scrutinized. One panelist expanded on the value of such a law, especially if the primary purpose was over consumer contracts. These are rarely international. The law’s reach would thus be naturally limited. The Panel concluded with the agreement that upon thorough analysis, comparisons with existing laws, and focus on clearly distinguishing any new laws from pre-existing legislation, implementation of this proposed law could offer value to participating countries.

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Mediation in Germany, Especially the Role of Attorneys
By: Dr. Axel Boesch

Introduction

In Germany, mediation is becoming more and more important as an alternative to classical legal disputes in state courts. While it is true that mediation does not yet have the same importance in Germany as it has in the American legal system, this is probably because state jurisdiction is generally well regarded in Germany\(^1\). Compared with the USA, lawsuits in Germany are relatively cheap and fast. Nevertheless, mediation is prevailing more and more considering its advantages to litigation and/or arbitration. The advantages are, in particular, flexibility in defining the subjects of mediation, and the possibility of finding solutions which surpass the rigidity of judgments and allow the consideration of non material or even emotional interests\(^2\). It is even possible to remove particular issues from the mediation if it becomes apparent during the mediation that they cannot be resolved. This may facilitate at least finding a compromise on the remaining issues of the mediation\(^3\). According to empirical studies, seventy percent (70%) of mediations are successfully concluded\(^4\). Besides the flexibility regarding the subject and the result, there is also flexibility with regard to the parties. While legal procedural possibilities of including third persons, or persons being only indirectly interested in a subject, are limited\(^5\), it is not a problem to include them in mediation proceedings\(^6\). Furthermore mediation helps to avoid an increasing discord between the parties as they have to work out a mutually acceptable solution together. This represents a major advantage for parties that have commercial relationships which are to be continued. Another advantage – in particular for commercial companies – is the avoidance of public knowledge of their disputes which is not possible when in lawsuits in public courts. Finally, mediation is faster and cheaper than litigation or arbitration. With regard to the advantages which mediation has for commercial parties, it is interesting to mention the internal guidelines of Siemens which provide that lawsuits may only be the ultima ratio\(^7\).

Against this background, it is obvious that commercial lawyers, in particular, must respond to the growing importance of mediation which is increasingly requested by American companies, but also, more and more frequently, by German clients\(^8\). For a long term commitment to clients, it is essential to offer mediation to give them the opportunity to benefit from the advantages of mediation set out above. It can even be recommended for lawyers to act themselves as a mediator. This represents an interesting change to the role as a party representative, as well as a possible competitive advantage. It can also help to understand better the mediator’s role and improve the representation of one’s own client in

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5. §§ 64 ff. ZPO.

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mediation. This article will firstly describe the lawyer’s role as a mediator (Part I), and then present the lawyer’s role as a party representative (Part II).

I. Lawyer as a mediator

Pursuant to German law, mediators do not need to be recruited from legal professionals nor do they need any legal education. To ensure the quality of mediation, mediators are only obliged to ensure their own training responsibility9. Thus, “mediator” is not a protected term, which is why any person can act as a mediator. In fact, mediators often have the same professional background as the parties themselves. In some areas, this is particular sensible as they have a better understanding of the technical issues at the core of the dispute. But in other areas where technical issues are less important, lawyers generally are highly qualified as mediators. Particularly, as further discussed below, commercial lawyers are perfectly qualified to be mediators in economic cases, although they risk running the mediation too “legally”.

1. Commercial lawyers as perfect mediators

The success of mediation primarily depends on the mediator’s personality and experience10 as well as on the way in which the mediator and the parties work together11. In economic cases, two attributes are crucial for a good mediator. On the one hand, he must be able to guide the mediation in an efficient and neutral way12. This presupposes a familiarity with often long and complicated negotiations which will help him to maintain an overview and to guide the parties in the right directions. On the other hand, he must be able to understand the economical background of the case as well as the economic interests of the parties.

Given these requirements, commercial lawyers can be perfect mediators if they are trained and educated as such. Having both knowledge on law issues and economic understanding, they are ideally qualified to mediate in economic cases. Firstly, commercial lawyers deal with comparable cases every day. They are used to understanding and simplifying complex facts and working out the important points on which a solution has to focus. Due to their experience in representing their clients in negotiations and in court, they (should) know how to run negotiations. It may even be an advantage if they normally act as party representatives, because, quite simply, they know the parties’ situation and can respond to it. Due to their legal knowledge, they can work towards a legally reasonable solution. A mediator without a legal background runs the risk of leading the parties to a solution that may seem to suit their economic interests but which completely ignores important legal requirements.

2. Risk of acting too legally

Whilst the legal qualification of commercial lawyers is an advantage which helps them run the mediation, it also poses a risk to the mediation process. Generally, German lawyers are very self confident of their own methods of thinking and of resolving problems which they often consider to be superior to those of other professions. For this reason, commercial lawyers, like any lawyers, run the risk of being too narrow-minded regarding both the way to run mediation, and the solutions to be taken into consideration. However, the purpose of mediation is not to find a solution corresponding to a legal qualification of the facts, but rather to find solutions which are mutually acceptable to all parties. This can even be an unusual outcome, totally ignoring the legal situation and demanding the mediator employ a certain degree of creativity13.

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9. German Mediation Code § 5 I. § II provides for the possibility to qualify for the title of „certified mediator“. However, the respective national ordinance has not yet been issued.
12. Leiss, Empirische Erkenntnisse zur Mediation im Wirtschaftsrecht, SchiedsVZ 2007, 139, 141.
Therefore, mediators with a legal professional background have to pay attention not to approach mediation too “legally”, otherwise, they run the risk of suffocating the parties’ creativity and of summarily dismissing possible solutions.

II. Lawyers as party representatives in mediation

The lawyer representing a party in mediation seems to find himself in an ambiguous role. On the one hand, he has to encourage his client’s willingness to compromise, while on the other hand, German law provides that a lawyer has to protect his client against negative impacts on his legal situation, in particular against the loss of rights. However, it has to be considered that a renunciation of some rights may not necessarily contradict the client’s interests. In fact, the idea of mediation is that it does not always correspond to the client’s interests to enforce a maximum of rights. Often a client is not interested in a further escalation of a dispute to keep an existing (economic) relationship alive and prefers a solution equally acceptable for the other party. Along with this interest of the client, there is a corresponding duty of the lawyer to inform the client and to advise him on the possibility of mediation. In the mediation hearing, the lawyer’s role is different than his role in a usual lawsuit.

1. Duty of information

Amongst lawyers who are not familiar with mediation there is still a widespread prejudice that mediation is “something for softies”. Mediation does not fit within the classical idea of a lawyer fighting for his client in court to enforce his rights. Therefore, many lawyers still shy away from recommending mediation to their clients. Consequently, lawyers who actively promote mediation still have a competitive advantage. Nevertheless, mediation is not only worth being presented to clients because of its advantages for the clients and because of the lawyer’s competitive interest, but also if a case is suitable for mediation, the lawyer even has a duty to inform his client about mediation. Lawyers have a duty of managing cases in a cost efficient manner (Pflicht der kostengünstigsten Mandatsführung).

Even without taking into consideration the chances of success of a lawsuit, an alternative dispute resolution procedure is often advantageous for the client as being the less expensive procedure. Therefore, a lawyer has to advise his client on its advantages and disadvantages and whether mediation is suitable to a case. Both matters are dependent upon various aspects including the parties, their relationship, and their character. He has to weigh the risks of full-blown litigation/arbitration and discuss them with his client in comparison with any available alternative dispute resolution methods, such as mediation.

2. “Back up role” during mediation

The success of mediation primarily depends on the way in which the mediator and the parties work together. For...
mediation to be effective, a direct and unfiltered communication between the parties and the mediator is important. Unlike in court, the lawyer is normally not the negotiator for his client, but has to remain in the background. This leads to the question of which way a lawyer, as a party representative, can support his client during the mediation hearing without disregarding the mechanism of mediation.

Often the lawyer’s role is described as that of a coach who supports his client in the background. This means that the lawyer firstly has to prepare his client by explaining the facts, possible legal issues and arguments to his client. During the mediation hearing, the lawyer has to maintain an overview. If questions of detail occur, he has to be able to give answers regarding the facts in detail, present documents, and point out arguments to his client. This allows the client to concentrate on the negotiation. If the lawyer notices misunderstandings or communication deficits, he has to point them out to his client. If necessary, he has to explain particular aspects to his client and advise him on legal questions. In this role, it can be helpful if the party representative is himself, a mediator. By understanding the mediator’s way of thinking, as well as his working methods, the party representative is able to “instruct” and to “play” the mediator. He can help the mediator to understand his client’s interest better and to follow an approach suitable for his client.

The most important role of the lawyer in mediation comes at the very end of the mediation if the parties are about to find a solution. It is up to the lawyers to draft a sophisticated agreement which legally implements the economic arrangement found by the parties. In this context, the lawyer has to check the schemes of arrangement from a legal point of view and to discuss them with his client.

Conclusion

From the German perspective, mediation represents a “win-win” potential, both for the parties and for the lawyers. The parties are not only satisfied by fast results, but also by the process of mediation itself. They achieve sustainable results respecting their overall economic situation. Furthermore, the parties’ commercial relationship can be maintained without being burdened by a possibly endless law suit. However, what is good for the parties is good for the lawyers too, and helps them to build up a long term relationship with the client, to whom he provided a quick and cost effective solution by way of mediation.

Finally attorneys, inclined to favour interest based negotiations and not limited to the mere legal aspects of conflicts, have the potential to become good mediators, and thus, to help provide business orientated solutions.

Taking Depositions for use in International Commercial Litigation: German requirements

by Anna Engelhard-Barfield

Taking depositions of witnesses in Europe is quite different from taking depositions in the U.S. The Hague Evidence Convention, which applies to the taking of depositions in most European countries, imposes restrictions on where depositions can take place, and whether a foreign court will be involved. Germany has signed the Convention, but has entered special reservations for the taking of depositions in Germany. For example, voluntary depositions must be taken at the U.S. Consulate in Frankfurt, but an unwilling witness must be examined by a German judge in the courtroom. In Germany, only non-parties testify as witnesses and the scope of questioning is very narrow.

Depositions of an unwilling witness require the filing of a letter of request with one of the sixteen German "Central Authorities". Once the Central Authority has determined that the request complies with the Hague Convention, the Central Authority will forward the request to one of the local courts for execution. The judge commissioned to examine the witness will rely on a list of questions provided by the attorneys.

Afterwards, the party attorneys may ask follow-up questions. There is no court reporting, no video recording and no cross-examination. The judge summarizes the testimony at the conclusion of the testimony. The judge is in control of the process (§§ 380, 390 ZPO (German Civil Procedure Rules)), and has arrest authority for a witness who refuses to testify.

The U.S. Consulate requires that all notices of deposition be submitted at least six weeks in advance, together with the payment of an administrative fee of $1,283.00. A consular officer will administer the oath, but attorneys examine the witness. Court reporting, video recording and cross-examination are allowed, however, attorneys are not allowed to bring laptops or mobile phones onto consular grounds. There is no internet access nor speaker phones in the conference room. U.S. rules concerning the attorney-client privilege, attorney work product, and in-house counsel privilege do not equally apply in Germany, Austria or Switzerland. None the less, the panel agreed that in German-speaking courts the main purpose of taking witness testimony is to obtain information towards settlement and to enable the judge to make an informed decision. Witness coaching is not allowed. German attorneys and judges consider witness preparation a questionable, improper measure.

U.S. rules concerning the attorney-client privilege, attorney work product, and in-house counsel privilege do not equally apply in Germany, Austria or Switzerland.

Editor's Note: The 2013 Deposition Instructions are available from the US Consulate upon request. The official State Department website currently shows only the 2011 Deposition Instructions, available at: http://germany.usembassy.gov/
Panel Summary: Data Privacy for M&A Lawyers – How the Comprehensive Information Requirements of Due Diligence Collide With Limited--Purpose Processing Demands of Modern Data Privacy Laws

By: Anika Keswani

The Data Privacy for M&A Lawyers’ panel began with a scenario where a US--based company wanted to acquire a German company. Both must undergo thorough due diligence but German privacy laws limit the American company’s access to certain data, particularly about employees.

The panel discussed whether such limitations could prevent the acquisition from completion. The acquiring company would be interested in liabilities in the form of employee salaries, benefits, and (key in Germany), pension obligations. However, under German laws, this would not be accessible during the negotiation period.

An additional concern is the location of the virtual data room for data shared across companies. Under German laws, personally identifiable information should be stored within Germany. However, US safe harbor and binding corporate rules agreements permit data to be stored outside of Germany pending the full compliance by the non-German organization. This requirement further complicates discussions.

The final point covered cyber security measures M&A lawyers should take, to protect client information in the virtual data room. Because of different requirements across countries, M&A lawyers must clearly define and execute a strategy that works for both organizations to ensure full compliance and allow the acquisition to move forward.

The panel emphasized the importance of a thorough due diligence process, and having data privacy experts from each country available to ensure compliance.

London Fall 2013 Meeting News

(continued from page 2)

On the business side, if you are attending the London Fall Meeting, please join us on Thursday October 17th at 4pm in the Spectra Suite at the conference hotel to attend our Monthly Committee Call in person. We will also have a table at the Breakfast Networking Meetings event on the same morning at the hotel so please do stop by to say hello!

Martini, Shaken not Stirred

On the social side*, as a precursor to the Europe Committee’s launch of a formal proposal to have Immediate Past Chair Florian Jorg be the first Swiss actor to play James Bond, please do come and join us on Tuesday October 15th for a Martini, Shaken not Stirred evening at Dukes Hotel, a short cab ride from the House of Lords opening reception. Drinks at Dukes Bar is something of an occasion. Frequent by James Bond author Ian Fleming, the bar is said to have been the inspiration for James’s Bond classic martini order. We will convene in the drawing room at 8.30 pm for a fun networking event where the masterful martini connoisseur Alessandro Palazzi will tell us a little about Dukes and the Ian Fleming connection as well as teach us how to make (and drink!) the perfect martini. Canapes will also be served. The event will finish at 10.30 pm at which point any “Dr. No” fans can retire for the evening while the more discerning “You only live twice” fans can move to a nearby establishment for some further refreshments!

It should be fun, we hope you can make it! Responses please to Pat English at pat.english@matheson.com. As with previous fun events, Pat is relying on the honesty code and will collect money on the night of the event.

DISCLAIMER: The materials and information in this newsletter do not constitute legal advice. EUROPE UPDATE is a publication made available solely for informational purposes and should not be considered legal advice. The opinions and comments in EUROPE UPDATE are those of its contributors and do not necessarily reflect any opinion of the ABA, their respective firms or the editors.

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For this event, we have also invited our friends from the Joint Venture and M&A Committee. Again, to facilitate the reservation (and spaces are limited), please register with our event vice-chair Pat English under pat.english@matheson.com as soon as possible but latest by 11 October 2013. Please do bring your friends from other committees along. The cost for the evening is £30.

Europe committee dinner

Wednesday October 16th at 9:30pm at Lutyens restaurant just a few minutes walk from the reception at Middle Temple, is the Europe committee dinner. For this event, we have also invited our friends from the Joint Venture and M&A Committee. Dinner will be £100 per person and will include wine, bottled water, soft drinks and a three course meal. Please reserve your spot as soon as possible as reservations are on a first come first serve basis. Due to circumstances beyond our control the restaurant will require our menu choices one week in advance. As a result: 1) Nicola Weston (nicola.weston@slaughterandmay.com) will need your completed reservation forms (including choice of starter and main course) no later than Wednesday, October 9th at 3pm CET; and 2). Please transfer payment for your meal to Slaughter & May (account details are included in the reservation form you will receive).

Section of International Law Council Meeting

All Europe Committee members are welcome to attend the Section's Council meeting on Saturday October 19th, at which the Council will consider a policy proposal by the Europe Committee and the US Lawyers Practicing Abroad Committee pertaining to modernization of requirements and practices related to notarization of signatures, particularly in a cross-border context.

Further information is available from the Committee Co-Chairs and Europe Committee Vice-Chair for Policy Werner Kranenburg. You may contact any of them personally via email.

If you would like for Europe Committee leaders in London to make a special effort to make contact with you, please let one of the co-chairs know and they will be happy to follow up.

Best wishes for engagement at the forthcoming London meeting,

The Europe Committee Co-Chairs: Patrick Del Duca, Pat English and Wilhelm Ziegler also which to extend a special thanks to Europe Committee Immediate Past Co-Chair Florian Jorg, now a co-chair of the M&A Committee with whom we will share dinner Wednesday evening)
The Europe Committee continuously seeks qualified professionals prepared to contribute their time and talents to continue developing a more active Committee. This is a prime opportunity to become involved with a community of lawyers that share an interest in Europe and European law, who are fellow American Bar Association members.

The Europe Committee welcomes any suggestions, ideas or contributions to enhance this occasional publication.

If you are interested in participating actively with the Committee, please contact any member of the Committee Leadership.

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