GERMANY (DISPUTES)

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Dr Florian Wettner is a partner of METIS Rechtsanwälte LLP. Florian specialises in domestic and international litigation and arbitration with an emphasis on disputes in financial, capital markets and corporate matters, post M&A as well as general commercial disputes. He also has extensive experience with respect to the handling of complex claims and liability cases under insurance law (particularly in the area of D&O and other indemnity insurances) and acts for insured companies and directors and officers.

According to Legal 500 Germany 2018, Florian is described as an 'excellent and assertive lawyer and litigation strategist'.

Founded as a spin-off of the international law firm Freshfields Bruckhaus Deringer LLP in 2010, METIS has grown to be one of the leading business boutique law firms in Germany. The firm provides high end legal advice to its domestic and international clients with a strong focus on corporate law and M&A, employment law and dispute resolution.

All partners of METIS have lived and worked abroad, the practical understanding of foreign legal systems and cultural backgrounds including various languages spoken (amongst others, Arabic, Chinese Mandarin and Russian) make METIS a competent partner in international mandates.

TOP TIPS FOR

Successful negotiations

Knowing the facts: Perfectly knowing the facts underlying a dispute is key for successful negotiations as it is for successful dispute resolution in general. The vast majority of disputes is decided through the facts, not through questions of law.

Realizing the aims and sensitivities: It is absolutely essential to realize not only the own aims and sensitivities, but also those of the other parties involved. Where do I want to get? What is the others aim? What aspects might be negotiable, which might not? Are there interdependencies between several actors on one side that could influence the negotiation and the aims? All this should be thoroughly thought about before entering into negotiations.

Fortiter in re, suaviter in modo: While driving a hard bargain in terms of strongly pursuing the envisaged aim, one should always distinguish the matter from the people dealing with it. Don't take attacks from the other side personal, don't personalize arguments yourself. Being fair and reliable often helps reaching the envisaged aim.

I QUESTION ONE

What is your best practice approach when advising General Counsel, to ensure dispute resolution clauses are to their real advantage and do not obstruct enforcement proceedings?

When considering an appropriate dispute resolution clause in a cross-border contract, the substantive law governing that contract is a meaningful starting point. The applicable substantive law usually suggests the jurisdiction to be agreed on, as it basically makes sense to choose the national courts that know the applicable national law.

Once the possible national courts are thereby (preliminarily) determined, it has to be figured out if litigation in these national courts, or alternative dispute resolution procedures, namely arbitration or mediation procedures, are in the best interest of the client in the event of a dispute.

A major consideration is whether the client would have to litigate in the courts of the country where the other party is domiciled. Whereas in constitutional states, fair and objective proceedings can basically be assumed, it cannot be ruled out entirely that a judge may be more favorably inclined to a party who is well known and respected in the country of the court. This could be an argument to seek arbitration on neutral ground instead.

Another important consideration is whether the title to be obtained in the respective dispute resolution procedure, can actually be enforced against the unsuccessful party and, in particular, its assets. This is not an issue if the parties to a cross-border contract are all located in the EU, but it could be an issue if at least one party is located outside the EU. If reciprocity is not guaranteed, via international treaty, this could encourage a party to agree on the jurisdiction of the home courts of the other party.

As regards the enforcement of arbitration awards, it appears sensible to agree on a seat of arbitration in a country which is a member of the New York convention, because it is then much easier to get an award enforced in another member state. In most cases, however, this is a given since most states are part of the New York convention.

I QUESTION TWO

Are there any particular rules around funding litigation in your jurisdiction that General Counsel should be aware of?

In general, contingency fees or conditional fee arrangements with attorneys are not permitted under German law. They are only allowed if the client would otherwise be deterred from proceedings, and thus from access to justice, because of its financial situation. German law also allows for the payment of no attorney fees or fees lower than the applicable statutory fees where a case has been unsuccessful.

Litigation funding by non-parties to the litigation is allowed, provided that the litigation funder does not provide legal services in the litigation. Since litigation funders are neither qualified as banks nor as insurers, any regulatory provisions do not apply. Litigation funding is not regarded as frivolous. Therefore, the third-party litigation funder cannot be held liable for any adverse costs of the counterparty.

The minimum funding amount for disputes is approximately EUR100,000. German funders usually structure their remuneration either as a percentage of the amount actually recovered, or as a multiple of the amount invested. Standard terms call for a 30 per cent share of proceeds up to EUR500,000 and a 20 per cent share of any proceeds in excess of this amount. The civil law principle of common decency should limit the agreeable share of proceeds to be paid to the funder in case of success. Shares of up to 50 per cent of the proceeds are discussed to be safe in that respect.

Generally, the funder may terminate the funding agreement at any time and at its sole discretion should the chances of success have been impaired for whatever reason. In such case, the funder will of course lose his right to a share of the proceeds.

Neither the funding, as such, nor the underlying agreement has to be disclosed to the court or the opposing party. It can be disclosed of course if this appears advantageous from a strategic point of view.

I QUESTION THREE

What techniques are typically used by international counterparties in your experience when attempting to gain the initiative during a dispute? How important are civil procedural rules?

The asked for techniques typically used by international counterparties depend on the forum where the dispute would have to be ultimately solved, as well as on the applicable type of dispute resolution. The accordant rules framing the dispute resolution, e.g. civil procedural rules, are important.

If there is no contractual dispute resolution clause applicable, agreeing on a certain mechanism once the dispute has already arisen might often not be feasible. The counterparties usually tend to attempt to gain initiative by using the 'unilateral weapons' available to them.

When preparing an action or a defense against a potential action, a party will have to weigh the arguments speaking for and against each of several possible forums. For example, a claimant might seek to bring an action in the courts of his home jurisdiction, or in a jurisdiction which provides for certain plaintiff-friendly instruments, such as punitive damages. A potential defendant may consider the lis pendens doctrine by seizing a court in a jurisdiction which is known for its slow proceedings.

Another typical instrument to gain initiative and to enhance your own (negotiating) position in a dispute, is to choose expedited procedures in order to surprise the counterparty or to obtain a (preliminary) title. In this regard, proceedings for provisional relief (attachment and preliminary injunction) could be an option. In Germany, another frequently used instrument in this context are summary proceedings based on documentary evidence only. This allows the claimant to quickly obtain an enforceable title subject to reservation; the defendant who was not able to prove his position by documents may (only) in a later stage raise objections and submit evidence without restrictions. The mere fact that a judgment was rendered against him and the looming enforcement proceedings may induce the opponent to seek an amicable solution to the dispute.