

A tribunal without judges?

Curiosities from international arbitration

Guest contribution by Sebastian Meul

Introduction

Hamburg is one of the most beautiful and well-known cities in Germany. But what about Hamburg as the home of an arbitration institution? Even among German arbitration professionals, Hamburg and arbitration do not go together. Nevertheless, one of the oldest German, and maybe European, arbitration institutions is indeed located in Hamburg: at the Waren-Verein der Hamburger Boerse e.V. (Trade Association of the Hamburg Stock Exchange).

The Waren-Verein

Importers of colonial goods established the Waren-Verein over 100 years ago in order to pursue their commercial interests. At the same time, they set up an arbitration institution intended to serve as their platform for resolving disputes. A hundred years later, the arbitration institution of the Waren-Verein is still active although only deals with around 20 cases a year.

I recently came across the Waren-Verein when I represented a client in arbitration proceedings pursuant to its arbitration rules. I found the proceedings extraordinary.



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Quick decisions

The best thing about arbitration in accordance with the rules of the Waren-Verein was that it took the tribunal only six months to rule (luckily for us in our favor).

Disappointingly for the client, the rules do not provide for any reimbursement of the winning party's lawyers' fees. Disappointingly for the lawyers (of the winning party), the rules do provide for the possibility of filing



an appeal with the Waren-Verein – rather uncommon in international arbitration.

Most challenging for us, however, was a provision contained in section 4 paragraph 2 of the rules, which reads in the English version:

“Only proprietors, directors, managers, personally liable partners, authorized signatories or executives of firms whose subject matter is the commerce with goods or the mediation or the closing of merchandise-contracts and which should be registered in a German commercial register or cooperative register may be appointed by a party or on behalf of a party.”

Lawyers not welcome

In other words: According to the Waren-Verein rules, it is a precondition that each arbitrator qualifies as a Kaufmann (merchant) or at least as an executive of one. It goes without saying that it might be difficult for a tribunal consisting solely of merchants to assess a case that involves complex legal issues.

In our case, the rights and obligations under a joint development agreement were in dispute. The question as to whether or not our client was right depended solely on the correct assessment of legal questions related to default and proper execution of termination rights. We were therefore eager to have at least one lawyer at the tribunal. Ultimately we were able to work around section 4 paragraph 2 of the rules: Under German law, corporations such as an Aktiengesellschaft or a GmbH qualify

as merchants by statutory definition. As a consequence, the general legal counsels of such corporations, who are regarded as their executives, meet the requirements of section 4 paragraph 2 and are – at the same time – qualified lawyers.

On this basis, we eventually managed to have our case heard by two lawyers – our arbitrator was able to convince his merchant coarbitrator to appoint another lawyer as chairman – and won.

Outlook

So, all's well that ends well? Unfortunately not. As indicated above, the opposing party had the right to file an appeal with the Waren-Verein and made use of it. Given that the appeal arbitrators must fulfill the same requirements with regard to qualifications as the first-instance arbitrators, we once again had to find a merchant who was also a qualified lawyer in order to avoid a tribunal without judges. ◀



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