German Maritime Arbitration Association – arbitration and/or mediation?

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BIMCO has been kind enough to allow this association to present itself again after the previous reports of the Chairmen Hartmut v. Brevern in *BIMCO Review 1994* and Dr Peter Holtappels in *BIMCO Review 1995*. It was Peter Holtappels who proposed and the members of our association who kindly confirmed at their annual meeting in Hamburg in 2001 that the writer should take the chair of GMAA. Therefore BIMCO's offer seems to have come just at the right moment.

Established in 1983, GMAA (to be distinguished from its big brother or mother in London apparently just by its first letter 'G' instead of 'L') seems to have established itself in the German national and international shipping business as a proper and quick tool for dispute resolution at moderate prices. Anybody can be a GMAA arbitrator and no party can therefore complain not to have selected a good one. The GMAA fee scale is tied to the claims in dispute. Therefore it contains a built-in 'Small Claims Procedure'. GMAA decided from the start to be 'old fashioned' with its two-arbitrator panel but this way it may – by coincidence or by foresight – have hit just the right spirit for upcoming times where costs seem to run out of control and – I venture to say – 'alternative dispute resolution (ADR)' seems to be grabbed for almost desperately by people and enterprises for whom costs have become a nightmare.

On the other hand, there is no doubt that South-East Asia and its tradition of conciliation has had its impact on the ADR development. We all remember the report of Patrick Griggs of Ince & Co. in the 1979 *Lloyd's Maritime and Commercial Law Quarterly* (page 138) about an arbitration procedure of a collision case in China at the Whampoa Harbour Superintendency Administration. Mr Griggs was invited there to negotiate an amicable result with the assistance of the arbitration board. At the same time he was given to understand that he was expected to reach that result and not to leave China before he had. That was perhaps not what we would expect of an 'alternative' to dispute resolution but it needs to be added that Mr Griggs reported further that he was quite satisfied with the result – and with the speed of four days instead of four years of proceedings.

Incidental or not – GMAA seems to offer a tool which allows its procedure to serve for both 'adversarial' and 'interactive' approaches to arbitral litigation. In the April 2002 issue of *International Business Lawyer*, page 158 ff, Hilmar Reschke-Kessler, lawyer at the German Federal Court, university lecturer on arbitration and Vice Chairman of the arbitration and ADR committee at the International Bar Association (IBA), has scrupulously distinguished the tradition of the 'adversarial' Anglo-American approach from the 'interactive' approach which seems to be a tradition of mainly German-speaking countries. Tradition in the Anglo-American world has it that litigation or arbitration is 'adversarial' – that is, under the entire control of the parties where the judge or arbitrator proves his impartiality and independence by keeping silent and hiding his view until the very end when he hands down his judgment or award.

The German 'interactive' way has a history of about 100 years. It is probably fair to say that it started at the end of the 19th century when Austria, later copied by Germany, started to strengthen the position of the judge in the procedure by giving him authority of guidance (see Schumann in Stein-Jonas, *German Code of Civil Procedure* (GCCP) *Commentary* 20th edition, Introduction Nr. 115). After the First World War, this went further because it was felt that the court should assist the parties as a mediator. Since then there have been different approaches to mediation in German civil litigation through the introduction of an obligatory mediation attempt before an adversarial procedure. This obligatory mediation was later abandoned but mediation in litigation was not given up and has been discussed extensively in German politics and legal science (see Leipold in Stein-Jonas ibid. Art. 279 Chapter I). The present position was established in 1976 by introducing an Art. 278 sect. 1 GCCP which now reads: 'In every stage of the procedure, the judge shall look out for an amicable termination of the dispute or parts of it.'

Beside this approach, the GCCP of 1877, which was one of the important German Codes introduced in the Bismarck empire after 1871, has always (see Leipold in Stein-Jonas ibid. Art. 139, Nr. 2) contained a provision which now is found in Art. 139 sect. 2 GCCP and in today's wording reads: 'A point which has been overlooked or believed to be irrelevant by a party must not be the basis of a judgment unless the judge has given occasion to the party to comment on it.' In clear words: Since the Germany of 1871, the civil court judge has always had a legal obligation to tell beforehand what facts and questions of law he is going to address in his judgment. This is, I feel, contrary to the Anglo-American tradition.

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German constitutional principles for due process of law. A judgment after such procedure would in itself without any further point of criticism allow an appeal. That, on the other hand, is why it is customary to say in Germany (with some exaggeration): At the closing of the hearing, each party knows what judgment to expect. In practice there are, of course, cases where the judge indicates in the hearing that he has not made up his mind on the result yet.

The trend expressed by this German practice has been strengthened over recent years with some additional force exercised by the legislator. Whereas before, the judge's obligation to disclose his view during the hearing had in practice remained somewhat vague and only the top personalities among the judges were really able to 'meet the test', in 1976 legislation was passed which made it an express obligation of the judge to open the hearing of a case by reporting himself facts and legal issues. Cases became rare (although not excluded) where 'judgments by surprise' were handed down. Therefore civil court litigation in Germany has indeed become an interactive adventure where a dispute is discussed between the parties and the court.

Such a procedure tends to end with a settlement because a party which knows what to expect need not see this in writing and can save the costs of a judgment. Nor can it be a surprise that the 'settlement ratio' goes up with the quality of the judge – because the better his explanation, the more convincing his proposals.

For anybody who is involved in GMAA procedures, this background of civil court litigation should be known because in practice most GMAA arbitrators are German judges or lawyers or businessmen who have been raised with the German legal tradition and therefore live with it. They do what every legally trained person in the world does – they apply what they have learned and if they have to apply foreign rules, they base it on their home education. It is like a German who crosses a street in London – of course he knows that he has to watch for cars coming from the right because of the traffic driving on the left but you can be sure he will not set foot on the street before he has glanced left for cars which might be driving on the right-hand side after all.

The GMAA rules clearly show that they follow the German principles. The obligation to induce the parties to a settlement as expressed in Art. 278 GCCP quoted above almost literally appears in Art. 13 of the GMAA rules. This obligation in practical terms cannot be met without clearly explaining risks and chances to the parties as ordered in the GCCP. It must be considered an implied obligation, too, of the GMAA arbitrators.

This may still not appear altogether convincing to an English or American lawyer because he may be accustomed not to trust European continental and especially German fact-finding. This is of particular importance for GMAA because in maritime law, its main field of operation, of course English and American traditions have been predominant in the development of rules and trade customs. The German state courts have taken notice of this by proposing that typically English contract clauses should be read and interpreted in their English law context. This, however, cannot only apply to substantive law but must also be applied to the procedure. English substantive law does not go well with German systems of procedure.

The writers of the GMAA rules may or may not have known this. Surprisingly, perhaps, they have introduced Rule 11 which corresponds exactly to a previous Art. 1034 of the GCCP stating that 'the arbitrators have to investigate the facts as far as they deem necessary'. This Art. 1034 has been abolished by the adoption of the UNCITRAL model law on arbitration by the German legislator but GMAA Rule 11 has remained. One of the most prominent German writers (Peter Schlosser, *The Law of the International Private Arbitration*, 2nd edition, 1989, sect. 637 to 641) stated that under the regime of Art. 1034 GCCP it was apparently self-evident that any arbitrator may request the parties to present what he finds to be necessary – this in particular in view of the differences between the Anglo-American and continental European procedures. Therefore, under the regime of this Art. 1034 GCCP, it was well established that an arbitrator in a German arbitration procedure is obliged to find the relevant facts and is free to investigate and to demand from the parties what he deems necessary.

The writer is extremely glad and relieved to say that the two arbitrators in a current procedure have made an interim decision confirming this. I believe therefore it is safe to say that GMAA arbitrators are not confined to traditional continental European rules about burden of pleading facts and evidence. They have the liberty and therefore the obligation to make the parties disclose their knowledge of facts where otherwise a complete legal evaluation of the dispute would be impossible. If a party fails to disclose its knowledge it may be assumed by the arbitrators that the hidden facts were against it.

This is not a discovery procedure. In fact, there is quite a difference between discovery and arbitrators' orders for substantiation. In the latter case it is the arbitrators who take the lead and decide what they want to get and to see. In the former it is the parties which command the requests for discovery for their pleadings and the substantial basis of it. There is, however, quite obviously no unanimity that 'discovery' would or should be applied in English arbitration of whatever kind (see the discussion at Hilmar Reschke-Kessler, ibid.) and I feel that arbitrators' orders for substantiation get to the same result without the risk of excessive exchange of questionnaires and documentation.

By the above quoted interpretation of Schlosser and GMAA Rule 11, it can therefore be concluded that the GMAA procedure contains all that an English or American mind can desire and he must not be afraid that a point of law would be disregarded because a party cannot substantiate its submissions.

If, in summary, GMAA arbitrators are obliged to hear the parties, to let them explain what they need to know and to order presentation of facts and means of evidence, the GMAA procedure appears to be an 'ADR' procedure in itself.

'Itself' first refers to the tribunal where two arbitrators are expected by the parties to agree on a result, if only because the parties do not want to pay a third arbitrator. For continental legal training, this causes no problem because the entire law is codified or directly authorised by codified law (like trade customs) and in theory must have the same meaning for everybody – including two arbitrators sitting on the same panel. In practice of course, there remain fields of judicial discretion but even there, routine and interpretation rules have reduced most of these. And once the arbitrators have the same opinion – why should they not be able to convince the parties of their result?

This form of ADR does not meet the secrecy requirement between each party and the mediator separately which by many writers is thought to be essential to the mediation form of ADR. Others, however – quite rightly, I believe, question whether this kind of secrecy is of the essence or even an advantage (see here also Hilmar Reschke-Kessler, ibid.). I share the latter view because I do not believe that mediation can leave the tracks of law, that is, the application of general rules which are valid for everybody. If that is true, I find no advantage in putting a burden of secrecy on the shoulders of a mediator. Thirty years of experience in German litigation have shown me that it is the intention of the parties which matters. If they decide that they want to settle, they will not do it better through secrecy from each other.

The same tool which GMAA Rules 11 and 13 give for mediation may apply to arbitration rules like those of the German Institute of Arbitration (DIS), where Art. 27 and 32 have similar wording, and those of the International Chamber of Commerce (ICC), because its Art. 18 provides for 'Terms of Reference' to be drawn up by the tribunal and signed by the parties. There, the arbitrators are to describe the relevant facts and the relevant legal issues – and thereby every normally gifted brain will know where the ball runs and draw its conclusions. Both DIS and ICC procedures, however, are generally considered to be reserved for really large disputes where the complexity of their rules and of their organisation may be appropriate. GMAA gets along without organisation and its costs quite well – just like LMAA.

I am quite aware that the GMAA type of mediation does not appeal to the English tradition, to which it seems difficult to understand, because one is not used to a judge or arbitrator disclosing his view before judgment or award. I do not know whether the judge or arbitrator by opening his mind should be afraid of being lynched by the party less favoured by the expected award, because the risk would be the same after the award. Of course, opening his mind perhaps makes the judge the victim of attempts for persuasion but is this not what is really needed? The law does not grow in the secrecy of a mind but in the discussion and practice of a community – or between the parties and their lawyers on the one side and the judge(s) on the other side. If this were common opinion, attempts for mediation would be an automatic stage in every dispute – and what has apparently been a tradition in China for centuries might also become a tradition in Europe and America: It is a social and a moral obligation to settle and not to force an issue by making a judge write a judgment.

BIOGRAPHY

Friedrich Strube has been Chairman of the German Maritime Arbitration Association (GMAA) since 2001.

After legal training in Tuebingen, Berlin and Hamburg, he was admitted to the Bremen Bar in 1971 and has been working there as a lawyer with Blaum Dettmers Rabstein Bremen/Hamburg/Munich as partner since 1976 and as a notary public since 1979.

Friedrich Strube was secretary on the board of the Bremen Bar from 1984 to 1990 and a member of the German Federal Bar Commission of the Law of Civil Procedure in 1989-90. Since 1991, he has been a member of the Bremen Bar High Court of Honour.

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