Arbitral Institutions in Germany: The ´Schiedsgericht Berlin´ [x)]

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> ´Arbitral institutions which were acting in the former German Democratic Republic have ceased to exist with the effect, inter alia, that arbitration agreements referring to them are null and void´. Dr Dr Ottoarndt Glossner, *International Business Lawyer*, November 1991, at 470.

Dr Dr Glossner's report of the demise of arbitral institutions in the former GDR is reminscent of Mark Twain's comments on reading his obituary that reports of his death were greatly exaggerated. The Schiedsgericht Berlin to which Dr Dr Glossner refers (though not by name) is alive and kicking.

Given the leading role of the Federal Republic of Germany in world trade, it is curious that, with the exception of Hamburg, (justly world renowned, but largely for maritime and commodity dispute resolution), no significant international arbitration practice has developed in West Germany since World War II. Thus, no West German city is regarded as a major arbitration venue in the same way as Vienna, Zurich, Paris or London, and (apparently) international businessmen have preferred and have been encouraged to got to these cities rather than to arbitrate in West Germany.

But in the former GDR the situation was very different. The Arbitration Court (founded in 1954) attached to the Chamber of Foreign Trade ('Schiedsgericht bei der Kammer für Außenhandel Berlin') was extremly active in international arbitration and was the leading arbitral institution in the former Comecon countries. This reflected East Germany's economic and industrial power and its role as a major exporter. East German export contracts contained arbitration clauses, and under the conditions of trade between the Comecon countries claims in arbitration were brought in the country of the respondent. Moreover, East Berlin was the preferred neutral third party venue for many Comecon parties given the ease of access which they (though not the East Germans themselves) enjoyed to West Berlin. The Schiedsgericht Berlin (as it is now known to its supporters) was also active in East-West trade, some 15 per cent of its case load involving disputes on contracts between East German companies and their trading partners in non-Comecon countries. Indeed, of some 9,500 cases from 1954 to

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1991, approximately 700 involved East-West trade (see Heinz Strohbach, Schiedsgericht in Berlin, Zeitschrift für Anwaltspraxis ZAP-DDR at 457).

Before the last war Berlin and Hamburg were the tow centres of international arbitration in Germany. Hamburg arbitration developed on the basis of its pre-eminent position as the German maritime and commodity centre, and Berlin as the capital of an increasingly powerful and influential Germany. Thus, for example, Berlin was the stipulated venue for certain trade disputes between Germany and the Soviet Union following an agreement in 1935. Unfortunately for the historian of arbitration, the pre-war records of the Arbitral Court in Berlin were destroyed or lost during World War II.

The 'Deutscher Ausschuß für Schiedsgerichtswesen' (DAS), the leading German arbitral institution before the War, was founded in Berlin in 1920. After the War DAS was revived and was relocated to Bonn. Until 1988 DAS was principally an appointing authority, but since then it has operated as a full–scale arbitral institution. The 'Deutsches Institut für Schiedsgerichtswesen' (DIS) founded in West Germany in 1975 and based in Cologne, was not an arbitral institution as such, but was created to promote the use of arbitration as a means of dispute resolution. Recently (November 1991) DIS and DAS have merged under the name 'Deutsche Institution für Schiedsgerichtswesen'. However, perhaps through an abundance of caution, the separate existence of DAS has been maintained to try to ensure the continued validity of DAS arbitration clauses in existing contracts.

The history of the Schiedsgericht Berlin provides international practitioners with a fascinating insight into one aspect of the rapid process of German re-unification from November 1989 to 3 October 1990. In the immediate aftermath of the collapse of the wall a joint commission was established by East and West Berlin practitioners to consider how best to develop Berlin as an international, regional and local arbitration centre. Various ideas were canvassed, but under the extreme pressure of an accelerating process towards re-unification, minds were concentrated on how best to establish one single arbitration court in Berlin. By the end of April 1990 the framework for such a court had been worded out.

However, the project foundered on the rock of strong opposition from DIS and DAS to any such venture. According to one participant in the joint commissions' discussions, Dr Horst Brautigam, writing in the Berliner Anwaltsblatt No 11 (1990) at 332:

> 'This DIS had raised its "warning" voice before the conference even started pointing out that there was neither need nor interest for the Berlin project… The last session of the commission on June 5, 1990 could only state that an integration of DIS and DAS into the Berlin Concept was impossible.'

Professor Dr Strohbach and his colleagues, faced with the disintegration of the GDR, the prospect of imminent re-unification and the failure of their negotiations with the West Berliners, decided in June 1990 to go it alone. They founded the 'Vereinigung zur Förderung der Schiedsgerichtsbarkeit eV' (Association for the Promotion of Arbitration) which has as its objectives the promotion of arbitration, the maintenance and development of contacts to international organisations and arbitral institutions and the sponsorship of the Schiedsgericht Berlin.

On 23 July 1990, the Vereinigung concluded an agreement with the Chamber of Foreign Trade by which the Chamber's activities in promoting arbitration and sponsoring the Schiedsgericht Berlin were transferred to the Vereinigung. In particular, the Vereinigung took over from the Chamber of Foreign Trade the employment contracts of the Secretariat and the lease of the offices of the Schiedsgericht Berlin. The transfer proved very successful, for as at the end of December 1990, the Schiedsgericht Berlin had 223 pending cases, of which two dated from 1987, 32 from 1989 and 189 from 1990. In 1991 about 240 new cases had been registered in the Schiedsgericht Berlin.

There are currently over 280 cases pending; 3 dating from 1989, the rest being from 1990 and 1991. The parties are truly international, although the majority of disputes involve contracts with former Comecon countries concluded before the re-unification of Germany.

The Schiedsgericht Berlin is taking steps to attract international users. It has published its rules in English, French and Italian, and has augmented its list of arbitrators by including some of the leading figures in international arbitration, including some West German practitioners. The rules of the Schiedsgericht Berlin are based on UNCITRAL and the Schiedsgericht Berlin acts as appointing authority and administrator for UNCITRAL and similar arbitrations.

There has been a lively and stimulating debate in German legal circles about the effect of re-unification upon the activities of the Vereinigung and the Schiedsgericht Berlin. Yet this debate has been almost of academic interest in that very few parties in cases before the Schiedsgericht Berlin have queried the jurisdiction of the arbitrators or the validity of the arbitration clauses. The practice has developed of asking the parties to confirm that they wish their disputes concluded before the Schiedsgericht Berlin and, with very few exceptions, most parties have readily done so. As yet there has been no court decision on the validity of the arbitration clauses and (so far as Professor Dr Strohbach and his colleagues are aware) no action is pending before any court in Germany or elsewhere in which the validity of the arbitration clause is in issue.

The legal and constitutional arguments are quite complicated and discussions so far appear to have focused on questions of legal succession and identity. Professor Dr Strohbach and his colleagues assert that the 'Schiedsgericht bei der Kammer für Außenhandel der DDR' and the 'Schiedsgericht Berlin' are identical and must be distinguished from the institutional framework or sponsor, namely the Chamber of Foreign Trade until 23 July 1990 and the Vereinigung thereafter (see Heinz Strohbach, 'Schiedsgerichtsbarkeit in Ostdeutschland heute', *Betriebs-Berater*, Supplement 8, Volume 9 (1991), at 3). On the other hand Dr Dr Glossner and his colleagues assert that the Chamber and the 'Schiedsgericht bei der Kammer für Außenhandel der DDR' ceased to exist with no successor in title. Dr Dr Glossner and his colleagues argue that the Schiedsgericht Berlin, when acting pursuant to clauses in contracts governed by the uniform ALB/RGW 1968 – 1989, was part of a state controlled court system and not a system of independent international arbitration as understood in the West. Thus, it is said the Schiedsgericht Berlin was a State institution or organ which ceased to exist upon re-unification. German re-unification also terminated the obligations of the former GDR under the Moscow convention of 1972. Thus, so the argument runs, the arbitration clauses are invalid and parties to contracts which contain such clauses should now be invited to refer disputes to arbitral institutions governed by Western standards, such as DAS (see Hilmar Raeschke-Kessler, Normalisierung der Schiedsgerichtsbarkeit im Ost-West-Verhältnis, *Betriebs-Berater*, RIW Supplement to Volume 12 (1990), at 15).

Not surprisingly, Professor Dr Strohbach and his colleagues hold opposite views. In summary, they argue that the treaty of unification between the tow Germanies provided that the former GDR Rules of Arbitration apply to all cases pending on the day of re-unification. Those rules expressly provided that arbitration clauses such as those imposed by the ALB/RGW, were valid and thus clauses giving effect to a 'socialist approach' to arbitration were accepted within the German legal system. No basic principle was therefore violated. Moreover, it is argued that even before re-unification the Schiedsgericht Berlin had replaced the uniform Comecon arbitration procedure by rules akin to the UNCITRAL rules, see supra and Heinz Strohbach, Schlußfolgerungen aus der Übernahme bundesdeutschen Rechts der Schiedsgerichtsbarkeit, 6 October 1991, at 2).

As for the argument that upon re-unification the Schiedsgericht Berlin ceased to exist as a State entity, Professor Dr Strohbach maintains that the sponsoring organisation (the Chamber for Foreign Trade) was by its constitution a private legal entity.

Professor Dr Strohbach also rejects the argument that all obligations of the GDR under the Moscow Convention 1972 ceased upon re-unification and therefore that Schiedsgericht Berlin arbitration clauses are invalid. He relies upon Article 12 of the Treaty of Unification which provides that the validity, invalidity or adoption of the treaties concludes by the GDR will be discussed with the parties to the treaties. Thus, argues Professor Dr Strohbach, it is far from clear that termination of the Moscow Convention obligations was automatic.

The arbitration of disputes in post-unification Germany is governed by the provisions of sections 1025 to 1048 of the West German Code of Civil Procedure, West German law having replaced (virtually in its entirety) all East German law. (The former GDR Rules on Arbitration apply to all cases pending on the day of unification: see ZPO-Maßgabengesetz, Anlage I, Kapitel II, Sachgebiet A, Abschnitte III, IV zum Einigungsvertrag (Treaty of Unification) 31.8.1990.) Though the Code only provides for the situation when the designated arbitrator ceases to exist, see section 1033 subsection I ZPO-German Code of Civil Procedure, its provisions have been applied by analogy to the case when the designated permanent arbitral institution has ceased to exist (see the German 'Reichsgericht' decision RGZ 108 at 246.) However, the code is silent on the question of what facts are required to support the argument that the arbitral institution has ceased to exist. Nevertheless it seems to be justified to refer to the principle for the interpretation of the relevant code provisions (see Schwab/Walter, Schiedsgericht 1990, at 67). Parties to an arbitration agreement intend to arbitrate their differences rather than litigate them. German Courts tend to give effect to the parties' reliance on arbitration (see for several examples Schwab/Walter, supra, at 25).

The issue, therfore, seems to be whether the arbitrational framework the parties relied on when making the arbitration agreement is in fact still available. Thus, for example, if the dispute is between members of an association and both the association and its arbitration court cease to exist, clearly it is impossible to give effect to the intention of the parties (compare the fact findings of the German Reichsgericht decision RGZ 114, at 195). However, so the argument runs, it is possible to do so if, like in the example of the Schiedsgerichts Berlin, the Secretariat or administration of the arbitration court still exist with procedural rules which respect the autonomy of the parties, give a free choice of arbitrators and provide for an appropriate venue.

In these circumstances the continuing existence or otherwise of the original sponsoring organisation (in this case Kammer für Außenhandel der DDR) may be of limited importance and does not defeat the intention or validity of the agreement of the parties to arbitrate.

Predictably, in the very few cases where arbitrators of the Schiedsgericht Berlin have had to consider challenges to the validity of the arbitration clause, they have upheld the clause and the duty to arbitrate. Arbitrators, like judges, are reluctant to find that they have no jurisdiction. The debate is of interest, but to the outsider largely academic. But the debate lends force to the wise suggestion of Judge Holtzmann at a recent LCIA seminar in Berlin, that parties to contracts with Schiedsgericht Berlin arbitration clauses should be encouraged either to confirm that they wish to arbitrate before the Schiedsgericht Berlin, or before some other arbitral institution, whether DAS, ICC, AAA, or LCIA, or even ad hoc, under, for example UNCITRAL rules, rather than to argue that the Schiedsgericht Berlin has ceased to exist and, therefore, that the parties are bound to go elsewhere.

The attitude of Dr Dr Glossner and some of his colleagues in DIS and DAS has puzzled and dismayed many international arbitration practitioners who believe that it is important that international arbitration should be encouraged and the differences between the West and East German practitioners resolved by sensible and pragmatic compromise. If in the years to come the Schiedsgericht Berlin fails to attract contracting parties to resolve their disputes, then it will fade away and be seen merely to have performed a useful transitional role. It is for the marketplace to decide on the basis of fair competition. Live and let live is perhaps an appropriate maxim to follow.

International arbitration has an important role to play in ensuring the stability and predictability of international commercial contracts. This is particularly important in Eastern and Central Europe at a time when many of the former Comecon countries are making the harsh and difficult change from planned to market economies and from dictatorship to democracy. That is why some of us hope, with Mark Twain, that reports of the death of the Schiedsgericht Berlin are greatly exaggerated.

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