*Zornitsa Hvaldzhiyska**

Mediation in München

Am 27. Januar 2012 organisierte die Student Division (Chapter Süd) der Deutsch-Amerikanischen Juristen-Vereinigung e.V. in München den ersten Workshop zum Thema *Zukunft Mediation – Erfolgreiches Verhandeln im Mediationsverfahren* und rief somit ein bedeutendes Projekt ins Leben.

Die Veranstaltung, an der ca. 20 Studenten und Referendare aus ganz Deutschland teilnahmen, bildete den Auftakt des Ringworkshops *Zukunft Mediation*, welchen die Student Division ein bis zwei Mal im Jahr in Zusammenarbeit mit erfahrenen Mediatoren in München ausrichten wird.

Der Workshop wird sich auch in Zukunft an engagierte angehende Juristen richten, die sich für die Wirkungsweisen der Wirtschaftsmediation interessieren. Dabei soll jeder Einzelne die Möglichkeit haben, in einer kleinen Runde Mediationssituationen praxisnah zu erleben.

Ausgehend von diesem Konzept verlief im Januar dieses Jahres auch die erste Veranstaltung des Ringworkshops *Zukunft Mediation* in Zusammenarbeit mit der Kanzlei CMS Hasche Sigle aus München. Referenten des ersten Workshops waren Herr Claus Thiery und Dr. Thomas Lennarz, Rechtsanwälte und Partner in CMS Hasche Sigle und Frau Dr. Anke Meier, LL.M., Rechtsanwältin bei Noerr LLP.

Nach der Begrüßung wurden die Teilnehmer im Rahmen von zwei Praxismodulen mit dem Mediationsverfahren vertraut gemacht. Viele Fragen um das Thema „Was ist Mediation und was bringt uns sie?“ wurden im Laufe des eintägigen Programms druch die beiden Referenten Herr Thiery und Herr Lennarz detailiert beantwortet und mit zahlreichen Beispielen aus der Praxis schmackhaft gemacht.

Nach Genuss der bekanntesten Münchner Spezialität – Weißwurst – folgte das zweite Praxismodul. Herr Thiery und Herr Lennarz stellten die Phasen des Mediationsverfahrens dar und erörterten dem Publikum die Theorie dahinter. Anhand kurzer Fälle versuchten die Teilnehmer, zunächst in der großen und anschließend in der kleinen Runde, sich in die Schuhe eines Mediators zu versetzen und mehrere Parteien bei der Streitbeilegung zu unterstützen.

Die davor theoretisch erlernten Phasen der Mediation – Eröffnung, Ermittlung des Sachverhalts und der Interessen jeder Partei, Entwicklung von Optionen, ihre Bewertung und Auswahl sowie die Abschlussvereinbarung – wurden unter Aufsicht und mit Unterstützung der beiden Referenten praktisch erprobt. Dabei ging es darum, getreu nach dem Motto „Übung macht den Meister“, sich die Kommunikationstechniken eines Mediators anzueignen.

Schließlich hat Frau Dr. Meier das Mediationsverfahren in den USA in seinen Grundzügen dargestellt und in ihre vielfältige Erfahrung als Mediatorin Einblick gewährt.

Dieser lehrreiche Tag endete mit einem Empfang des Gastgebers CMS Hasche Sigle, währenddessen sich Referenten und Teilnehmer in entspannter Atmosphäre austauschen konnten.

Der erste Workshop zum Thema Mediation hat uns um zahlreiche Begegnungen, Gespräche und Eindrücke bereichert. Diese sind ein Meilenstein auf dem Weg der in den USA weit verbreiteten Institution der Mediation, welche in Deutschland immer weiter an Bedeutung gewinnt.

Besonderer Dank gilt unserem Gastgeber CMS Hasche Sigle.

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*Esther M. Hackl**

The Letter of Intent – Enforcement and Liability Risks: Talk by Charles Polzin in Frankfurt am Main

On May 10, 2012, Debevoise & Plimpton LLP hosted a talk organized by the German-American Lawyers Association in Frankfurt, at which Charles Polzin presented the American view of Letters of Intent, specifically their enforcement and liability risks, followed by co-speaker Dr. Frank Burmeister introducing the German perspective.

Charles Polzin, who graduated with a B.A. from Western Michigan University in 1975 and a J.D. from the University of Michigan Law School in 1979, is the European General Counsel and Assistant Secretary of BorgWarner Inc., a technology leader in highly engineered components and systems for powertrain applications. In his talk, Charles Polzin discussed the drafting of Letters of Intent by U.S. lawyers in the light of an influential appellate decision from the 1980s – Texaco, Inc. v. Pennzoil, Co. 729 S.W.2d 768 (Tex. App. 1987). This appellate decision largely upheld a Texas district court decision in which the jury had awarded Pennzoil USD 10.53 billion in its claim against Texaco for tortious interference with a contract that Pennzoil claimed to have with Getty Oil for a merger of the two companies. In a press release Pennzoil and Getty Oil stated that they had “in principle” agreed to a merger, which the jury deemed sufficient evidence for the existence of a contract. This outcome was indeed surprising considering that in the same press release Pennzoil and Getty Oil had also made the transaction subject to the execution of a definitive merger agreement, the approval by the stockholders of Getty Oil and the completion of various government filing and waiting period requirements.

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Charles Polzin argued that Texaco v. Pennzoil was particularly disconcerting with regard to the popular business practice of signing term sheets in order to create a record of negotiation results. Of course, the business people signing such term sheets regard them as preliminary, non-binding documents that will eventually be replaced by final and comprehensive agreements. However, in view of Texaco v. Pennzoil this assessment might prove entirely incorrect. After all, Pennzoil successfully sued Texaco for tortious interference with an alleged contract that was not based on any more substantial facts than the usual term sheet. On the contrary, in Texaco v. Pennzoil the jury looked at the totality of the circumstances, which merely comprised the negotiations between the representatives of Getty Oil and Pennzoil, a press release, the negotiation of a definitive stock purchase agreement and SEC filings.

The facts of the case were as follows: On January 1 and 2, 1984, in the wake of an unsolicited tender offer by Pennzoil for Getty Oil shares, Pennzoil, Gordon Getty and Getty Museum as the majority shareholders of Getty Oil, negotiated a Memorandum of Agreement reflecting the intended deal. This Memorandum stipulated that it would expire if it was not approved by the Getty Oil Board. Subsequently, the Getty Oil Board rejected the Pennzoil Tender Offer as well as the Memorandum and made a counteroffer, which was approved by the Pennzoil Board on January 3. What the jury found decisive for judging the totality of the circumstances in favor of the existence of a contract was the language of the press release from January 4 issued by Getty and Pennzoil. The press release announcing the intended merger consistently used the indicative verb "will", thus inadvertently emphasizing the binding quality of the negotiation result between Pennzoil and Getty. In the course of drafting a definitive merger agreement, also on January 4, Pennzoil amended its tender offer statement with the SEC, clarifying its intent to withdraw the offer "if" a definitive merger agreement was executed. On January 5, Texaco made an offer for 100% of the Getty Oil stock, which the Getty Oil Board accepted. The Board then withdrew the counter-proposal it had made to Pennzoil. Summarizing, it can be said that the furious negotiations over a couple of days, and not much more than that, were considered sufficient within the totality of the circumstances to provide the basis for finding the existence of a contract. Pennzoil's own SEC filings used the word "if" with regard to the conclusion of a definitive merger agreement, which speaks for the existence of doubt whether such an agreement would actually come into existence. Finally, as mentioned before, the press release referred to an agreement "in principle" that was subject to the execution of a definitive merger agreement, the approval of the Getty Oil's stockholders and the completion of various governmental filing and waiting period requirements.

Needless to say, the jury finding in Texaco v. Pennzoil rocked the legal community and forever affected the drafting of American Letters of Intent. Expressions such as "will", "shall" or "agree" had no more place in Letters of Intent and were replaced by terms like "would" or "intend". Provisions that are supposed to be binding, for example confidentiality clauses, have to be described specifically. Regarding the remaining content of Letters of Intent, the parties must make it clear that the language is not binding upon either party until a definitive agreement is signed. Concluding, Charles Polzin advised business people not to sign anything initial until it has been reviewed by counsel. Neither should they shake hands accompanied by a confident "we have ourselves a deal".

Following the American view, Dr. Frank Burmeister, a partner at Hengeler Mueller Partnerschaft von Rechtsanwälten in Frankfurt, presented the German perspective on Letters of Intent. As a preliminary remark, Dr. Burmeister pointed out that the term "Letters of Intent" was adopted from the US and is not actually a legal term to be found in the German Civil Code. In Germany, putting the title Letter of Intent on an agreement does not have any legal consequences in itself. Whether the content was meant to be binding, is a question of interpretation. If the Letter does not contain any open items, circumstances would indicate that the Letter of Intent is actually a binding contract. According to Dr. Burmeister, German Letters of Intent therefore make use of boilerplates for binding clauses and stipulate that all other clauses are non-binding. Furthermore, in Germany there is often a second layer of protection against the binding character of Letters of Intent. Certain contracts have to be notarized under German law and the lack of this formal requirement will make an agreement non-binding. However, in contrast to the US, the German Civil Code has incorporated the concept of pre-contractual relationships, which imposes a duty to act in good faith on the negotiating parties and makes them liable if they break off negotiations for no reason. While this liability risk can be mitigated by provisions stipulating that each party may terminate the negotiations at any time and no damages shall be claimed, willful misconduct or contradictory behavior that lead to the desistance from an agreement will always entitle to compensation. Concluding, Dr. Burmeister remarked that even though there are similarities between the American and the German doctrine of Letters of Intent, German law is more relaxed when it comes to the binding nature of Letters of Intent – a view that was reinforced by a lively discussion among lecturers and participants following the presentations.