*Sebastian D. Müller**

DAJV's Jour Fixe at King & Spalding – An Insight into Investment Arbitration

Responding to Political Risk in Latin America – this was the topic on the agenda of the Jour Fixe meeting on October 9, 2012, at the Frankfurt office of King & Spalding. Doak Bishop, a partner in the King & Spalding's Houston office and co-head of the firm's international arbitration practice introduced this topic to about 30 participants over lunch. The Jour Fixe, was organized by Jan K. Schäfer (King & Spalding, Frankfurt) in collaboration with the DAJV coordinator Rudolf du Mesnil (Heuking Kühn Lüer Wojtek).

In the past decade, there has been a tremendous increase in investment arbitrations worldwide. And, the DAJV was privileged to have Doak Bishop, one of the pioneers in this field as a speaker – no one has commenced more investment cases in Latin America. The Jour Fixe drew disputes lawyers from leading law firms as well as investors. After a short introduction by Jan K. Schäfer, Mr. Bishop presented an one-hour talk about the political risks which investors might face in Latin America, and highlighted the available means of investment protection for investors in that region.

Investment arbitration is a relatively new field that remains relatively opaque to many lawyers and investors. Its increasing importance is to be expected as investment treaty protection plays a significant role for investors, especially in countries where the investment climate is characterized by a lack of political and legal continuity. Investment arbitration provides foreign investors with the unique possibility of detaching their disputes from the host states' domestic courts and legal order, and resolving them in a neutral forum. But, investment disputes are not a one-way road. This can be seen from the pending "Vattenfall case" in which Vattenfall initiated arbitral proceedings against Germany following the nuclear phase-out.[1]

Mr. Bishop begun by identifying the driving forces behind some of the state conduct that might lead to investment disputes, namely change of government, political cronyism, populism, and the move towards new political ideologies. He also mentioned the countries in Latin America – Argentina, Bolivia, Ecuador and Venezuela – which have undergone profound political changes in the last decade. He noted that while investors will continue to struggle with the region's weak legal institutions, there are significant differences in the strength and stature of the legal culture in the various countries, including a fluctuating strength of judicial independence. Investors should therefore diligently consider existing and potential political risks *before* they make their investments and try to minimize the impact of such risks, *e.g.* by collaborating with influential local partners, by multilateral financing or partnering, and by taking out political risk insurance.

He stressed, however, that if an investment is affected by a change in the political climate in the host state *after* the investment had been made, investors are not necessarily unprotected: they might be able to rely on bilateral investment treaties (so-called BITs) or multilateral treaties (e.g. the Energy Charter Treaty (ECT) or NAFTA) in order to protect their investments or to get compensation for their losses. BITs, which, as Mr. Bishop further explained, play the most important role for investment protection in Latin America, are treaties between the home state of the investor (*e.g.* Germany) and the state where the investment is made (host state, *e.g.* Argentina). Through BITs the governments of the respective states grant certain rights to the investors and/or their investments in the host states' territory. BITs are not only found in Latin America: currently, there exists a global network of about 3000 such BITs.

Mr. Bishop went on to describe the types of rights that can be found in BITs, *inter alia*, the right to fair and equitable treatment, the prohibition of expropriation without adequate compensation, and non-discrimination clauses. In addition, he stressed the importance of the dispute resolution clauses found in many of the BITs. Such clauses give investors the right to arbitration proceedings against the host state if it violates the rights that have been granted to the investors or their investments in the BIT. The result is that investors can make use of a neutral forum before an arbitral tribunal. The applicable law in such cases is typically found in the BIT itself, and in public international law. This mechanism usually guarantees investors a fair proceeding and gives them a legal remedy against the state's interference that does not rely on the state's judicial system.

As to the neutral forums, Mr. Bishop explained that such investment arbitration cases are often administered by the International Center for Settlement of Investment Disputes (ICSID), a division of the World Bank, under the so-called ICSID Convention.[2] The ICSID Convention, which is ratified by over 140 states, provides a self-contained arbitral system that is detached from domestic law and in which state courts have no role except in enforcing an award. This is not the only forum available to investors, and some of the dispute resolution clauses in BITs also refer to (in addition or in the alternative) the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL) and, occasionally, to the arbitration rules of the International Chamber of Commerce (ICC) or Stockholm Chamber of Commerce (SCC).

The explosion in investment arbitration in the last two decades is evidenced by the fact that between 1965 and 1995 only about one case was filed per year at ICSID, but since 1995, more than 350 ICSID cases have been filed. Many cases filed by different investors relate to the same governmental measure – 30 % of ICSID's case-load relates to Latin America – for example, and Argentina has been involved in about 49 cases. Investment cases often involve significant amounts in dispute, and Mr. Bishop gave examples of several recent cases against Latin American countries where damages awarded to the investors were in the region of USD 100 and 150 million.[3]

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1 Vattenfall AB and others v. Federal Republic of Germany (ICSID Case No. ARB/12/12), cf. www.worldbank.org/icsid.

2 Convention on the Settlement of Investment Disputes between States and Nationals of Other States ("ICSID Convention", or "Washington Convention").

3 The (final) awards as well as a list of the pending cases are published on the official ICSID homepage www.worldbank.org/icsid. Another invaluable resource is http://italaw.com which publishes ICSID and non-ICSID investment cases.

Mr. Bishop then went on to explain the investment arbitration framework in greater depth, starting with the fact that investment protection under BITs only applies to foreign investors and/or foreign investments. A poignant issue therefore becomes who qualifies as an investor and what qualifies as an investment under the treaty. Mr. Bishop provided answers to questions by referring to pertinent investment cases. One of the questions asked was whether the foreign shareholders of a domestic company can qualify as "foreign investors" – yes they can. Another was whether investors from states that do not have BITs with the host state may channel their investments through a subsidiary in a country that has a BIT with the host state (so-called "BIT-" or "Treaty Structuring"). The answer was that arbitral tribunals have generally agreed that BIT structuring is a legitimate means of enhancing available investment protection. In the future, companies may consider the option of "BIT structuring" before making an investment.

When discussing the development of jurisdictional issues in investment disputes, Mr. Bishop addressed the impact of nationality, temporal issues under BITs and the controversial issue of whether parties may circumvent the so-called "cooling down" periods stipulated in several BITs – a period of several month where the investor and the state have to try to settle their disputes amicably – by relying on most favored nation (MFN) clauses.

In his presentation, Mr. Bishop also outlined the development in the interpretation of certain treaty standards, such as the standard of "fair and equitable treatment", and noted that the broad wording of this standard gives investors considerable scope for making a claim. He outlined how arbitral tribunals had construed and understood this standard in the past, and how today, it is widely acknowledged that issues such as the "legitimate expectations" of investors (*i.e.* the objective expectations that an investor had when making the investment) are protected by the fair and equitable treatment standard. In addition, he touched on the meaning of the "effective means provision", the development in the assessment of damages by arbitral tribunals, and the possibility of applying to tribunals for provisional measures, *e.g.* at times perhaps even involving the dismissal of criminal charges against an investors' employees.

In the last part of his presentation, Mr. Bishop addressed recent trends in the field. In particular the public policy concerns that have been at the center of recent debates – BIT claims often involve broader public issues than contractual claims. Also, he noted the quest to clarify applicable standards such as the relationship between the fair and equitable treatment standard, and the minimum standard in customary international law, the clamor for increased transparency, and the role of *amicus curiae* briefs.

He observed that Bolivia, Ecuador and Venezuela had denounced the ICSID Convention, in response to the increase in claims against them. Ecuador had gone further and denounced several BITs, as has Venezuela which denounced its BIT with the Netherlands. The denunciations of the BITs would not impact investments made prior to the denunciations as BITs generally have a so-called "tail" provision which ensures that they are applied to existing investments for 10 to 15 years following the denunciation. In Mr. Bishop's view, the fact that some states have denounced BITs should not be understood as the beginning of the end of investment arbitration as, in contrast, about 400 new BITs had been signed around the world in the past 6 years.

During and after the presentation, the attendees of the Jour Fixe took the opportunity to ask follow-up questions, discuss hot-button issues and exchange experiences. One of the main issues that came up in the questions was related to the enforceability of awards. Specifically, whether, in practice, states voluntarily comply with awards and what happens if they do not; how the enforcement against states works in practice; and whether home states are willing to support their investors at a certain stage by putting political pressure on the host states. Other questions related to Mr. Bishop's experiences in arguing the meaning of fair and equitable treatment standard before arbitral tribunals, and whether there was an option to consolidate several arbitral proceedings relating to the same state measure into a single proceeding.

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The Efficient Capital Market Hypothesis – Critical Thoughts After The Financial Crisis

Report of the Nineteenth Annual Meeting of the Harvard Law School Association of Germany e.V. on March 22nd/23rd, 2013 in Frankfurt a.M.

On March 22nd/23rd, 2013, the Harvard Law School Association of Germany e.V. held its nineteenth annual meeting in Frankfurt a.M. After arrival on Friday night, the Harvard Law School alumni met for a social get-together over food and drinks. Saturdays' official part of the annual meeting is traditionally hosted by a Frankfurt based law firm. This year, Jones Day kindly offered to host the meeting in their modern offices in Frankfurt's Nextower building. Upholding a cherished tradition, not only Harvard alumni are welcomed, but also members of the Harvard Club Rhein-Main, members of the Tönissteiner Kreis, and members of the German-American Lawyers' Association. The HLSA of Germany would like to thank its guests for participating and enrichening its annual meeting and is looking forward to continuing the exchange in 2014.

Following an introduction, HLSA of Germany's president, Professor *Gerhard Wegen* of Gleiss Lutz, presented two renowned and internationally recognized speakers to speak on sense and nonsense of the Efficient Capital Market Hypothesis (ECMH):

* Wissenschaftlicher Mitarbeiter bei Gleiss Lutz Hootz Hirsch in Stuttgart; Attorney-at-Law (NY). Der Verfasser dankt Dr. Leonhard Hübner, M. Jur. (Oxon.) sowie Marius T. Müller, M.A., für ihre wertvolle Unterstützung.