ändert sich erheblich je nachdem, ob ein Schiedsgericht über seine eigene Zuständigkeit oder über die Zulässigkeit entscheidet.

Nach einem Vorschlag zur konkreten Abgrenzung von Zuständigkeit und Zulässigkeit stellt die Arbeit sodann mehrere Arten von in Investitionsschutzabkommen üblichen Streitschlichtungsklauseln vor. Untersucht werden ihr Anwendungsbereich und ihre Rechtswirkungen. Im Fokus steht die Frage, ob ihre Unanwendbarkeit oder Nichteinhaltung die Unzuständigkeit des Schiedsgerichts oder die Unzulässigkeit der Schiedsklage zur Folge hat. Behandelt werden Schiedsklauseln (*consent*), aber auch Verhandlungsklauseln (*waiting clauses*), Klauseln über den (befristeten) Vorrang innerstaatlicher Rechtsbehelfe ((*limited*) *local remedies clauses*), Gabelungsklauseln (*fork in the road clauses*) sowie der Verzicht auf anderweitige Rechtsbehelfe (*waiver clauses*).

Schon mit diesen Ausführungen wäre der erforderliche Umfang einer Dissertation erreicht. Gewissermaßen als Bonusmaterial widmet sich der Autor in einem eigenen Abschnitt noch einem der derzeit umstrittensten Themen des Investitionsrechts, nämlich der Anwendbarkeit von Meistbegünstigungsklauseln auf Streitschlichtungsklauseln. Am Schluss steht das einleuchtende Ergebnis, dass Meistbegünstigungsklauseln die Zuständigkeit eines Schiedsgerichts nicht implizit begründen können, aber durchaus Einfluss auf die Zulässigkeit der Schiedsklage haben.

Eine eigene Bewertung der Arbeit muss mit Rücksicht auf einen abstrakten Interessenkonflikt der Unterfertigten und zur Wahrung des Rezensions-*ordre public* unterbleiben. Es mag der Hinweis genügen, dass auch diese Arbeit über die Förderung durch Druckkostenzuschüsse hinaus prämiert wurde und Gelegenheit zur spannenden Lektüre an der Schnittstelle von Schiedsrecht und Völkerrecht bietet.

IV. Schlussbetrachtung

Vier der sechs besprochenen Werke sind in englischer Sprache – der *lingua franca* der internationalen Schiedsgerichtsbarkeit[21] – verfasst. Lediglich die besprochenen Dissertationen liegen in deutscher Sprache vor, was wohl eher an den veralteten Promotionsordnungen deutscher Universitäten als auf dem Wunsch der Autoren beruht, vielleicht aber auch darauf, dass das Deutsche als Wissenschaftssprache noch nicht ganz abgemeldet ist.[22]

Die besprochenen Werke lassen sich im Hinblick auf Konzeption und Zielgruppe nicht unmittelbar vergleichen. Für die Praktiker empfehlen wir jedoch besonders das Werk von McIlwrath und Savage, das eine schnelle Hilfe für eine zeit- und kosteneffiziente Streitbeilegung sein kann.

21 *Drolshammer/N.P. Vogt*, English as the Language of Law? An Essay on the Legal Lingua Franca of a Shrinking World, Zürich, 2003.

22 Zu Dissertationen in englischer Sprache vgl. etwa *Hindelang*, The Free Movement of Capital and Foreign Direct Investment, 2009, Oxford University Press.

Tilmann Hertel, LL.M and Dr. *Annette Keilmann**

No Legal Professional Privilege for In-house Counsel in European competition law proceedings

In 2008, this newsletter reported on the decision of the European Court of First Instance in AkzoNobel Chemicals Ltd. and Akcros Chemicals Limited v Commission of the European Communities (Hilgard/Kraayvanger, DAJV-NL 2008, page 23). The court had ruled that EU legal professional privilege (LPP) does not extend to in-house communications and therefore such communications can be seized by the European Commission during investigations. This decision was appealed by Akzo/Akcros. Recently, the European Court of Justice (ECJ), the EU's highest court, decided on the appeal.

The long-awaited judgment of the ECJ has squarely rejected calls that in-house lawyer communications should benefit from LPP. It confirms the orthodoxy that only communications with external lawyers can be withheld from regulators. This article sets out the reasoning of the ECJ. Furthermore, it gives practical tips on how to attract and retain LPP to the furthest extent possible.

I. Background: EU law has never accepted that LPP should cover in-house communications

The concept of LPP is not one which is treated uniformly across jurisdictions. However, the components of legal professional privilege can be fairly and generally synthesized into the following five elements: an attorney, a client, a communication, confidentiality and legal advice or assistance being the purpose of the communication. LPP protects such confidential communications from disclosure, so that they cannot be seized by authorities or used in legal proceedings against the lawyer's client.

EU law has always respected LPP for communications between external EU lawyers and their clients. In addition, internal documents which are created exclusively for the purpose of obtaining legal advice from an external EU lawyer do attract LPP under EU competition law[1]. However, EU law has never accepted that LPP should also cover communications between an in-house lawyer and his or her employer.

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1 This was acknowledged by the European Court of First Instance in Akzo/Akcros (Jugdment of 17 September 2007 – Cases T-125/03 and T-253/03). These findings were not subject of the appeal.

Thus, as disappointing as the ECJ's decision in Akzo/Akcros[2] may be for in-house counsels and their employers, the decision comes as no surprise. Already in AM&S Europe Ltd. v Commission (AM&S)[3], the ECJ ruled that LPP only applies when (i) communications between lawyer and client relate to a client's right of defense; and (ii) they emanate from independent lawyers, that is to say, lawyers who are not bound to the client by a relationship of employment.

II. The ECJ's main arguments in Akzo/Akcros

The ECJ rejected all arguments which had been put forward by Akzo/Akcros and the large number of interveners, including the Dutch, UK and Irish governments and various legal industry bodies, that favored an extension of LPP to in-house communications.

1. Lack of independence

The ECJ confirmed its understanding in AM&S holding that the requirement of independence means the "absence of an employment relationship". The spoiling factor was an alleged lack of independence due to the economic reliance of an employee on its employer. The ECJ downplayed the counterbalancing effect of strict ethical rules applying to in-house lawyers admitted to a local Bar or Law Society. In the ECJ's view, such rules would not ensure a degree of independence comparable to that of an external lawyer because it would be impossible for an employee to ignore the commercial strategies pursued by his or her employer.

2. No breach of the principle of equality

In addition, the ECJ considered that refusing to apply LPP to communications with an in-house lawyer does not violate the principle of equal treatment. Even if an in-house lawyer is subject to professional ethical obligations like an external lawyer he or she – according to the ECJ – does not enjoy a level of independence equal to external lawyers. In-house lawyers are therefore – as the ECJ held – in a fundamentally different position from external lawyers and are therefore treated differently.

3. Evolution of national legal systems does not require extending the EU principle of LPP so as to cover in-house communications

Akzo argued that the personal scope of LPP should be widened on the ground that national laws are not unanimous and unequivocal in recognizing LPP for in-house communications. However, only a few Member States respect LPP for in-house communications. According to the Advocate General Juliane Kokott[4], these are the UK, Ireland, the Netherlands, Greece, Portugal and Poland[5]. The ECJ was unconvinced that EU law should be brought in line with the legal position in only a minority of Member States.

4. Modernization of EU competition rules does not justify a change in the EU rules on LPP

After the so-called modernization of the procedural rules on cartels in 2004, companies are required to self-assess the compatibility of their commercial arrangements with EU competition law. Akzo had claimed that this had increased the need for in-house legal advice and that, as a consequence, such advice should take place in a confidential environment. The ECJ brushed aside this claim. Procedural reforms – designed to reinforce the extent of the Commission's power of inspection – could not justify a change in the case-law on LPP.

5. No violation of the rights of the defense

The ECJ was not persuaded that the rights of the defense were undermined if in-house communications do not benefit from LPP. Rather, the court argued that a company seeking advice from an in-house lawyer must accept the rules relating to the exercise of the profession. These rules include the restriction on the applicability of LPP.

6. The principle of legal certainty is safeguarded

Furthermore, the ECJ rejected Akzo's claim that the differing approach of the Commission, as compared to that of certain national competition authorities, breached the EU principle of legal certainty. According to the ECJ, the clear division of competences between the Commission and national cartel authorities left no room for legal uncertainty. The ECJ took the view that a company whose premises are searched in the course of a competition investigation will know which authority is carrying out the investigation. By reference to the law applicable to that authority, the company will also be able to determine its rights. Either EU law or national law will decide whether the company concerned is entitled to rely on LPP in respect of in-house communications.

7. No violation of the principle of national procedural autonomy

Finally, the ECJ did not follow the argument that the EU approach to LPP violated national procedural autonomy. The question of which documents and business records the Commission may examine as part of its inspections under antitrust legislation is determined exclusively in accordance with EU law. In the ECJ's view, the uniform interpretation and application of the principles of LPP at EU level are essential in order for inspections by the Commission to be carried out under conditions in which the companies concerned are treated equally.

III. Practical tips to protect sensitive legal advice

As a consequence of the decision in Akzo/Akcros, in-house lawyers and their employers have to take into account that their communications are not protected by LPP. In competition law proceedings, the communications may thus be seized and used against the company by the Commission. Taking this into consideration, in-house lawyers should exercise caution when they advice their employers on competition law related matters and should even consider to give advice orally only. In sensitive cases, external EU qualified lawyers should be involved at the outset.

If a company consults a non-EU lawyer it is recommended to mandate an external EU-lawyer with the coordination of the obtaining of advice because non-EU lawyers will not benefit from LLP.

In addition, privileged communications should be clearly marked as such (e.g. "Attorney-Client Privileged Communication from External Counsel"). This is particularly relevant if advice from external counsel is forwarded within a company

2 ECJ, Judgment of 14 September 2010, Case C-550/07 P.
3 ECJ, Judgment of 18 May 1982, Case 155/79.
4 Opinion of Advocate General Kokott on Case C-550/07 P (Akzo/Akcros), delivered on 29 April 2010, note 103.
5 As to the situation in Germany see *Hilgard/Kraayvanger*, DAJV-NL 1/2008, page 24 et seq.

or summarized for internal purposes (those documents could, e.g., be marked as "Privileged Report on Advice Received from External Counsel")[6]. If a company prepares documents exclusively for the purpose of obtaining legal advice from an external EU lawyer these documents should also be marked as those. Moreover, companies should stress that the document is prepared for this sole purpose (e.g. by a statement on the exclusive purpose and possibly also by naming the external EU lawyer for whom the document is being prepared).

Finally, companies and their lawyers should file privileged communications separately. In particular transactions it may be considered to store sensitive documents, e.g. documents relating to the analysis of the relevant markets, in an extranet provided by external EU-qualified lawyers.

6 For further suggestions in German see *Kübler/Pautke*, BB 2007, 395.

IV. The principles of LPP as set out in Akzo/Akcros are only applicable to EU authorities

The decision of the ECJ in Akzo/Akcros has no bearing on national public authorities, but rather is only applicable to EU authorities. National authorities apply their national rules on LPP.

If a company is confronted with a competition issue, it may, however, be prudent to take precautionary measures as set out above even if, at first glance, there is no EU competition law issue at stake. This is because at the 'fact-finding' stage a company will rarely know whether an uncovered competition issue will be genuinely domestic or end up being prosecuted by the Commission. Therefore, a company should apply special care in that regard if it seeks advice on an issue relating to a highly 'regulated' sector (e.g. competition or tax).

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The enforceability of the General Public License in the US

Der nachfolgende Aufsatz ist ein Ausschnitt einer im Rahmen eines LLM-Programms an der University of California in Los Angeles entstandenen Seminararbeit und beschäftigt sich mit der Frage, ob die Softwarelizenz General Public License (GPL) in den USA gerichtlich durchsetzbar ist. Das Thema ist in wirtschaftlicher Hinsicht für viele Softwarefirmen von weitreichender Bedeutung, die „open source" Software nutzen oder selber erstellen. In rechtlicher Hinsicht ist die Problematik deshalb spannend, weil sie bislang noch nicht von einem US-Gericht entschieden wurde und insofern momentan keine rechtliche Sicherheit hinsichtlich der Durchsetzbarkeit dieser Lizenz in den USA herrscht. Der Beitrag wird zunächst die grundsätzliche Problematik darstellen, sich mit den hierzu vertretenen Meinungen auseinandersetzen und im Anschluss anhand eines neuen Ansatzes aufzeigen, warum die besseren Argumente für eine gerichtliche Durchsetzbarkeit der GPL sprechen.

1. Introduction

The GNU[1] General Public License (GPL) is a free so-called copyleft[2] license for software and other kinds of works[3]. Programmers and hackers often refer to the GPL as the free software movement's "constitution"[4]. "The GPL has become a powerful force in the information age. A hack on the copyright system, it turns the concept of copyright upside down[5], creates a whole community cooperating around the world and enables the development of *software by the people, of the people and for the people*"[6] by denying anyone the right to exclusively exploit a program.

The Free Software Foundation (FSF)[7] explains the concept behind free software[8] as follows: "Free software is a matter of liberty, not price. To understand the concept, you should think of free as in free speech, not as in free beer. Free software is a matter of the users' freedom to run, copy, distribute, study, change and improve the software."[9] The free software licenses were created in order to secure and protect these essential freedoms for programmers and users.[10] That means that only the license to exercise these rights is free and remains free under the GPL. But a distributor can theoretically charge a price for the sales contract or for service contracts accompanying the software, as long as he respects that the buyer has the rights as provided for in the

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1 The GNU Project is a free software, mass collaboration project, announced on September 27, 1983, by Richard Stallman at MIT that initiated the GNU operating system.

2 Copyleft is a play on words usually symbolized by a "reversed" c in a circle which is basically the © sign mirrored. The copyleft describes the practice of using copyright law to offer the right to distribute copies and modified versions of a work and requiring that the modified versions of the work are licensed the same way.

3 Preamble GPLv2.

4 *Tai*, http://www.free-soft.org/gpl_history/: "The GPL (The GNU General Public License), created by Richard Stallman, serves as the *de facto* constitution for the Free Software movement. It covers the majority of Free Software/Open Source software and has become the legal and philosophical cornerstone of the Free Software community".

5 Note that licensing a work under the GPL is different from releasing it into the public domain which is a range for content that is not controlled by anyone at all or to put it differently, "The public domain is material that is not covered by intellectual property rights", *Boyle*, The Public Domain, Enclosing the Commons of the Mind, Yale University Press, 2008, p. 38.

6 *Tai*, Fn 4.

7 The Free Software Foundation (FSF) is a nonprofit organization founded by Richard Stallman, the creator of the GPL. According to itself, the FSF has "a worldwide mission to promote computer user freedom and to defend the rights of all free software users", *Brown*, Free software is a matter of liberty, not price, available at http://www.fsf.org/about. The FSF is also the copyright holder of the GPL text and has the right to publish new version of the GPL.

8 Note that there is a definition difference between "free software" and "open source software" (for the official definition of open source see http://www.opensource.org/docs/osd.

9 FSF, The Free Software Definition, http://www.gnu.org/philosophy/free-sw.html.

10 If a consumer buys closed-source software, he only acquires to the right to use the program for its intended purpose and not to copy, modify or run it on more than one computer. By opening the plastic wrap around the box that contains the software, the consumer becomes bound by the so-called "shrinkwrap license" which is now – after being heavily criticized- generally regarded as enforceable, see *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447 (7th Cir., 1996); *Smith*, B.Y.U. L. Rev. 2003, S. 1373.