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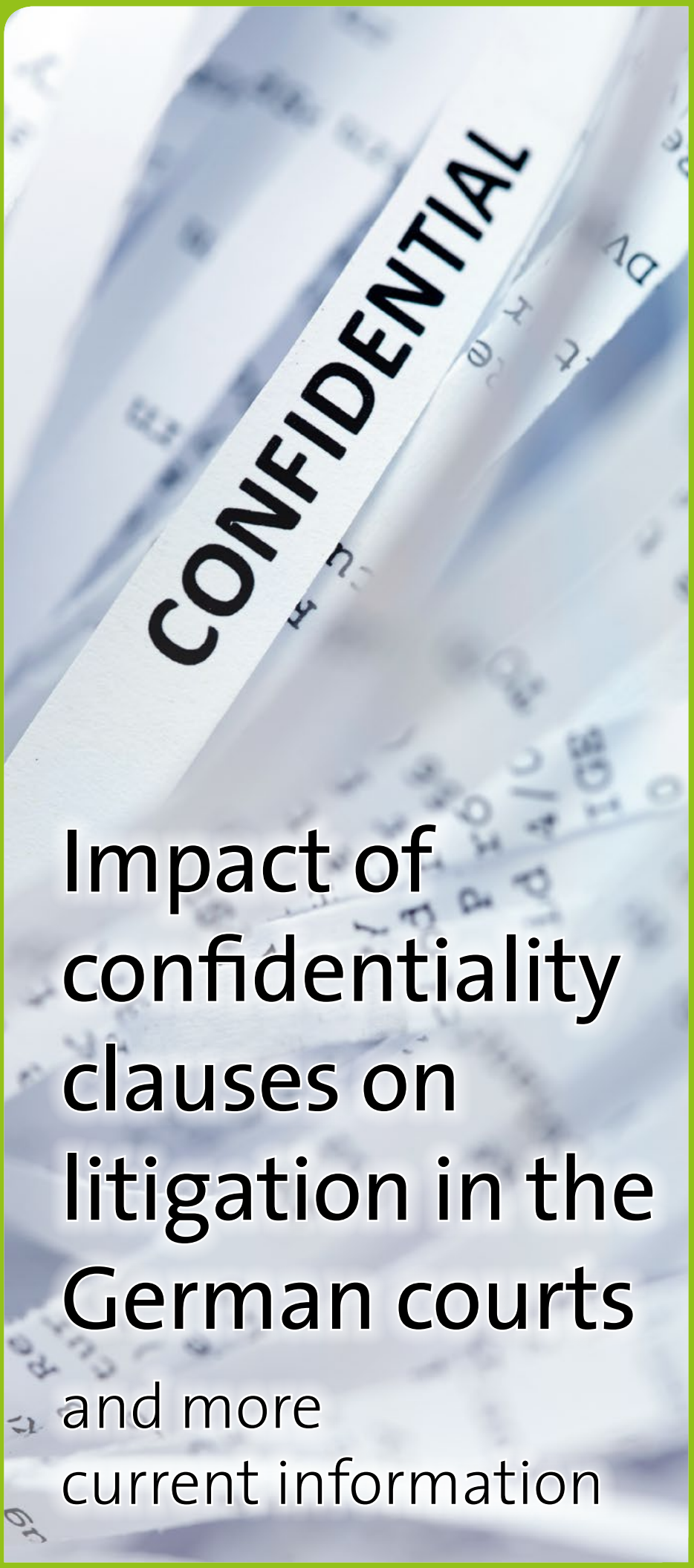
International Dispute Resolution

NEWS



Impact of confidentiality clauses on litigation in the German courts

and more current information

Client Information Letter
No. 01 | September 2013

Preface

Dear Readers,

It gives me great pleasure to announce the launch of the GGI Practice Group International Dispute Resolution (PG IDR) newsletter. I hope you will find a lot of useful information in our first edition relevant to your daily work.

I thank all members of the Practice Group for their overwhelming response to my call for contributions to the newsletter and invite all members of GGI to join our Practice Group as well as contribute articles to the next newsletter.

Our next Practice Group meetings will be held in Rome at the GGI Italian Business Summit (11 October 2013) and in Cancun at the GGI World Conference (01 November 2013), which you are kindly invited to attend.

Best regards,
Johan F. Langelaar

Global Chairperson of the
GGI Practice Group
International Dispute Resolution

Johan F. Langelaar

GGI member firm
TeekensKarstens advocaten notarissen
Legal
Leiden, The Netherlands
Johan F. Langelaar
T: +31 71 535 80 00
E: langelaar@tk.nl
W: www.tk.nl

Impact of confidentiality clauses on litigation in the German courts

By Dr. Karl Friedrich Dumoulin

Confidentiality clauses are widely used in M&A and IP transactions as well as in cooperation agreements between high-tech companies and also in arbitration and mediation agreements.

Therein, the parties involved usually undertake not to disclose certain confidential information disclosed by the other party in the formation of the agreement. Moreover, it is often the case that the parties also undertake not to make use of certain evidence made known in the transaction. If, at a later date, certain elements of the transaction become contentious between the parties and the case goes to court, the question arises whether and to what extent the parties and the court are bound by the confidentiality agreement, i.e. whether a party is permitted to submit to the court certain information or evidence defined as confidential in the agreement.

Civil litigation in the German courts is governed by the rule of party disposition. In accordance with this rule, if a fact asserted by one party is not explicitly disputed by the other party the fact is then regarded as admitted (cf. Section 138 Subsection 3 German Civil Procedural Code). Additionally, if one party asserts a fact and the other party explicitly admits to such a fact, the admission automatically becomes a basis for the court's decision[1]. The admission may only be revoked if the revoking party proves that the admission was not true and the result of an error; the admitted fact may not be revoked merely on the basis that it was not true (cf. Sect. 288 and 290 German Civil Procedural Code).

Moreover, according to Section 138 Subsection 1 of the German Civil Procedural Code, the parties have to make their declarations about factual circumstances in full and in accordance with the truth.

The prevailing opinion in Germany accepts that clauses in confidentiality agreements regarding the non-disclosure of certain facts in court as well as the non-usage of certain evidence in court are valid.

The main argument is that Section 138 Subsection 3 and Sections 288 and 290

(1) cf. Wagner, NJW 2001, 1398 and Wagner, Prozeßverträge, 609 et seq.; Official Collection of the Decisions of the Supreme Court of the German Reich 96, 57, 59; 160, 241, 243; Official Collection of the Decisions of the Federal Supreme Court 38, 254, 258; 109, 19, 28

of the Civil Procedural Code show that the parties are given the powers to agree on the factual basis of a court decision.

However, the validity of these clauses is limited where the contrary is apparent or where the parties maliciously cooperate to the detriment of a third party[2]. Additionally, as confidentiality clauses and their effects on litigation are an expression of the doctrine of freedom of contract, they are subject to the general principles governing any other agreements. They can therefore be challenged for reasons of deficiency of intention (i.e. error, wilful deceit) or if they violate the laws regulating general terms and conditions.

Subject to the above restrictions, the parties may not only declare certain information confidential and therefore keep it out of the reach of the court, but also undertake mutually not to submit certain evidence, i.e. exclude an arbitrator or a mediator as witness or protocols from arbitration proceedings as documentary evidence. If a party submits information treated as confidential to the court or calls an arbitrator or a mediator as witness, the court will have to treat both the facts submitted as well as the evidence offered as inadmissible[3].

In summary, the restriction of the use of confidential information and/or certain evidence in confidentiality clauses is, as a rule, valid under German law. However, as should have become apparent from the above, confidentiality clauses should be worded with care. Moreover, in arbitration and mediation proceedings, the prudence and experience of the arbitrators or mediators are crucial: they should endeavour to maintain a proper balance between the parties when it comes to disclosing sensitive information at any stage of the proceedings.

GGI member firm
FPS Rechtsanwälte & Notare
Legal
Dusseldorf, Germany
Dr. Karl Friedrich Dumoulin
T: +49 211 30 20 15 14
E: dumoulin@fps-law.de
W: www.fps-law.de

Dr. Karl Friedrich Dumoulin

Dr. Karl Friedrich Dumoulin is Global Vice Chairperson of the GGI International Dispute Resolution Practice Group and partner at FPS in Dusseldorf. His areas of expertise cover the entire range of corporate and commercial law including litigation and dispute resolution, very frequently in an international context.

FPS Rechtsanwälte & Notare is one of the largest fully independent German law firms with offices in Berlin, Dusseldorf, Frankfurt/Main and Hamburg. FPS currently employs over 120 lawyers and notaries. One of the firm's core areas of expertise is national and international litigation as well as dispute resolution.

FPS RECHTSANWÄLTE & NOTARE

(2) cf. Official Collection of the Decisions of the Federal Supreme Court 37, 154, 156 | (3) cf. Wagner, ibd, 1398, 1400

Commercial dispute in Japan – litigation or arbitration?

By Seiichi Yoshikawa

Lawyers often face the question whether to resolve a commercial dispute in court or via arbitration. In Japan, arbitration is not necessarily considered a favourite forum. (Each year twenty or so arbitration cases are filed with the Japan Commercial Arbitration Association.) Reasons: arbitration

...next page

can be more costly than litigation because parties must pay the administration fee which is as expensive as the stamp duty for filing litigation, plus the arbitrators' fee which does apply for litigation.
Arbitration can take as much time as litigation depending on how complex the case is and how busy the arbitrators are. The fact that Japanese judges are generally reliable is another reason for choosing litigation over arbitration. Of course, arbitration has its own merits.

Existence of the dispute, not to mention the nature thereof, can be kept confidential and if the parties agree, the English language can be used for the procedure and discovery (unavailable in litigation).

All in all, a case-by-case decision must be made depending on the particular circumstances and if arbitration is considered desirable, whether the other party will agree to it or not.

GGI member firm
Koga & Partners
Legal
Tokyo, Japan
Seiichi Yoshikawa
T: +81 33 578 86 81
E: yoshikawa@kogapartnerslaw.com

Seiichi Yoshikawa

Seiichi Yoshikawa is a senior partner of Koga & Partners and has handled many international litigation and arbitration cases including debt collection. He has served as Vice President of the Japan Federation of Bar Associations and Councillor of the International Bar Association.
Koga & Partners is based in Tokyo, Japan. Its practice areas include international litigation and arbitration, finance, competition law, M&A, media law and general corporate matters.

Legislative Decree No. 28/2010 – No. 69/2013

Mediation in civil disputes

Dr. Mariagiulia Signori

GGI member firm
COMMA 10 – Commercialisti & Avvocati
Auditing & Accounting, Tax, Legal, Advisory, Corporate Finance
Milan, Italy
Dr. Mariagiulia Signori
T: +39 02 481 92 58
E: mariagiulia.signori@comma10.it
W: www.comma10.it

COMMA 10
CHARTERED ACCOUNTANTS & LAWYERS

Dr. Mariagiulia Signori is a lawyer who has been based in Milan since 2005. She studied at the Università degli Studi di Milano, after which she gained an internship in Strasbourg. She started working in law firms where she expanded her technical training in judiciary proceedings, drafting contracts, evictions and injunctions concerning real estate matters. Today, she is a partner in Comma 10 and has profound experience in civil litigation on corporate and commercial law, M&A, due diligence, restructuring and insolvency and real estate issues.
COMMA 10's cornerstone is the professional collaboration between chartered accountants and lawyers with the mission to provide integrated services to individuals, private and public companies and non-profit organisations.

By Dr. Mariagiulia Signori

Italy regulated the extra – judicial proceedings for ADR with Legislative Decree No. 28/2010, which made provision for mediation becoming a preliminary condition for judiciary proceedings. This term of law was examined by the Italian Constitutional Court which, in its judgment No. 272/2012, declared the unconstitutionality of the legislative decree No. 28/2010 as it stipulated compulsory mediation.

In so doing, the new-born mediation was reduced to a mere choice of parties, thus losing the beneficial deflective effect of Legislative Decree No. 28/2010.

On 15 June 2013, the government enacted Decree Law No. 69/2013 in which mandatory mediation was restored only for a strict number of matters. This decree is effective and is now about to be approved by Parliament.

Decree Law No. 69/13 offers a huge reduction in the costs of mediation and provides for parties to have a preliminary meeting in order to assess the feasibility of mediation itself. The duration of the entire procedure has to be no longer than three months. Prior to the process, mediation can be ordered by the judge, even when it is not mandatory.

The role of the lawyer in the mediation process:

- The lawyer can take on the role of mediator;
- The parties must be assisted by a lawyer;
- The lawyers of the parties with the mediator must sign the agreement so that it assumes the effectiveness of enforcement.

After a year and a half of Legislative Decree 28/2010, more than 125,000 applications were presented to the various conciliation bodies and 20% of them ended in having achieved an enforceable agreement. The deflective effect of mediation is starting to show and hopefully it will improve in the next years in application to the recent ruling and legislative act.

Termination of distribution contracts in Spain

By Jordi Pallarès Vinyoles

Key legal aspects to be taken into account by a manufacturer that wants to terminate the relationship with a local Spanish distributor:

1. The parties are bound by an oral distribution contract: even if no written contract was ever drafted, the existence of oral distribution contracts is admitted to be legally binding on a regular basis by courts, provided that the existence of the relationship between the parties can be proven by other means (through faxes/emails, invoices, witnesses, etc.).

2. Exclusivity is not presumed: even if the local distributor has been the sole distributor throughout the years of the relationship, it does not automatically follow that they have had exclusivity. Other circumstances/evidence will be taken into account.

3. A contract with no term of validity can be unilaterally terminated at any time: however, if termination of the contract is not bona fide, the party that terminates the contract might have to compensate the other party for damages.

Jordi Pallarès Vinyoles

GGI member firm
GRUP VILAR RIBA
Auditing & Accounting, Tax, Legal, Advisory, Corporate Finance, Fiduciary & Estate Planning
Vic, Spain
Jordi Pallarès Vinyoles
T: +34 93 883 32 12
E: jpallares@versat.eu
W: www.vilarriba.com

Jordi Pallarès Vinyoles is a partner of Grup Vilar Riba. He is a lawyer whose main areas of expertise are litigation, criminal law, bankruptcy law and private international law. Jordi is a member of the Board of Vic's Bar Association. He has been appointed arbitrator for several proceedings and is a lecturer in the Universities of Girona and Vic.

GRUP VILAR RIBA is a multidisciplinary firm with over 80 professionals who provide a wide range of services, to both companies and individuals. The Group provides tax & accounting services, legal services, auditing services and business consultancy services. It has offices in Barcelona, Vic and Puigcerdà.

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To that effect, it is advisable to give prior notice of termination well in advance (the longer the relationship, the longer the prior notice period). Additionally, it might be sensible for the manufacturer to offer to the distributor that they repurchase any remaining stock that the latter might have (both to minimise damages to the

...next page

distributor and to effectively control the entry of products to the market).

4. The distributor might be entitled to compensation for the clientele: this is not an automatic consequence. It has to be proven that the clientele base for the manufacturer's products was created by the distributor and that the manufacturer will be able to continue benefiting from that clientele base.

Particularities under Austrian litigation

Overview of two particularities in the Austrian Civil Procedure Order

By Aurelia Tramposch

A Legal dunning proceedings

The Austrian legislator has increased the amount up to which legal dunning proceedings can be initiated.

Monetary claims up to EUR 75,000.00 can now be directly, effortlessly and promptly claimed through dunning proceedings. After having filed a default action by the creditor the court will subsequently issue a conditioned payment order without having appointed a court hearing or having scrutinised the legitimacy of the claim.

Formal court proceedings will only commence if contradictions are submitted. Otherwise, if the debtor fails to contest the conditioned payment order within four weeks, it becomes legally binding. Consequently, the creditor obtains an effective order which enables him to conduct garnishment proceedings.

Costs

Contrary to common law, the approach under Austrian law adopts the concept of "the loser pays all". If one party succumbs in the lawsuit, that party will be ordered to pay the opposing party's total lawyer's and court fees. This also applies when a claim is dismissed on whatever grounds resulting in the claimant having to pay the defendant's legal costs.

Legal representation costs are subject to and regulated in the Austrian Lawyers' Tariff (Rechtsanwaltstarif, RATG). The RATG is a complex system, explicitly stating the precise fee for each specific procedural step, always depending on the amount involved in the dispute.

The winning party can only seek reimbursement of its legal costs in an amount which correlates to the RATG. Notwithstanding that a client has an

Aurelia Tramposch

GGI member firm
Tramposch & Partner
Legal
Innsbruck, Austria
Aurelia Tramposch
T: +43 51 257 17 57
E: aurelia@tramposch-partner.com
W: www.tramposch-partner.com

Aurelia Tramposch is an associate who has been working in the Vienna office of Tramposch & Partner since 2012. Aurelia has previously worked in renowned law firms in London, Mexico City and Vienna with a focus on international arbitration.

Tramposch & Partner is a boutique law firm handling litigation and business law matters on a national and international scale. The three offices across Austria, based in Innsbruck, Vienna and Eisenstadt, enable the company to provide comprehensive legal counselling as well as representation at all Austrian courts and administrative bodies. Tramposch & Partner offers specialised services in the areas of corporate law, insurance and re-insurance law, debt collection and litigation.

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hourly rate remuneration agreement with its lawyers, in the case of prevailing in the lawsuit, the court will only grant legal fees in accordance with the RATG.

Another particularity under the Austrian Civil Procedure stipulates § 43 ZPO that costs will be split according to the success quota of the parties. The next contribution in this newsletter Tramposch & Partner will highlight the amendments to the revised Rules of Arbitration and Conciliation of VIAC (Vienna Rules).

Regulatory litigation in the United States

By Michael Quinan

In many ways, an American government agency may appear similar to a court, but there are significant differences.

There are so many courthouse lawyers today that, even in the same courtroom, many will hardly know each other. However, a small group of administrative lawyers will, in many cases, appear before the same tribunal. Not only will they have intimate familiarity with agency rules, but they will know the people and the specific accepted practices that other lawyers will not find in any rulebook.

By the time a case is tried in court, the parties have exhausted other options. However, Agency cases are bringing about battles on other fronts. While parties dispute a power line certificate, for example, they will also challenge local zoning approvals, environmental permits, and federal energy authorisation. In addition, they will also seek "legislative fixes" and conduct public relations campaigns.

A government agency is charged with protecting the public, not merely the determining the rights of the parties. A private party is well served by aligning its interests with the public interest.

Further to adjudicative powers, many agencies have been delegated legislative authority. This means that they are not strictly bound by the Rules of Evidence.

A convincing case may require qualified expert testimony. In addition, while appeals of agency decisions may be possible, appeal courts give great deference to agency panels. Winning your case at the agency level is highly recommended.

Michael Quinan

GGI member firm
Christian & Barton LLP
Legal
Richmond, VA, United States
Michael Quinan
T: +1 804 697 41 00
E: mquinan@cblaw.com
W: www.cblaw.com

Michael J. Quinan is a partner and vice chair of his firm's Energy group. He practices principally in the areas of business litigation, regulatory and administrative law and public utility regulation. Mike is president of the HARPS Foundation (American Youth Harp Ensemble), a performance company that provides conservatory-level music education to students of all ages. He enjoys catching a Washington Nationals' Major League Baseball game with his wife and sons.

Christian & Barton LLP. A general business and civil litigation law firm located in Richmond, Virginia.

CHRISTIAN & BARTON, LLP
ATTORNEYS AT LAW

Business rescue as an alternative to liquidation in South Africa

By Cornelia van Heerden

With the inception of the Companies Act 2008 (hereinafter referred to as 'the Act), South African corporate law practitioners were recently introduced to a new concept, the principle of Business Rescue.

Traditionally, local corporates in financial trouble have had very few legal options. Any mistaken step could easily be deemed an act of insolvency. The courts have provided a clear indication of what is required from practitioners, stating that business rescue proceedings only apply to an ailing corporation which, given time, has a reasonable prospect of being sustainable.

Some of the major advantages to business owners are that the Act protects businesses by providing for: temporary supervision of the company, the management of its affairs, business and property, a temporary stay on the rights of claimants against the company in respect of property in its possession, and the development and implementation of a business rescue plan to restructure its business, property, debt and other liabilities.

More practically, it entails that a company under business rescue, cannot be sued or executed against, can suspend existing contracts and that sureties or guarantees given by a company may not be enforced.

In summary, it is beyond doubt more advantageous to all parties involved that a company, in which various persons invested capital and time, and which provides employment security for many while also creating a source of income for the state in the form of tax, remains trading.

...Authors profile next page

Cornelia van Heerden

GGI member firm
Heyns and Partners Inc
Tax, Legal, Advisory,
Fiduciary & Estate Planning
Goodwood, South Africa
Cornelia van Heerden
T: +27 21 590 72 00
E: cornelia@heyns.co.za
W: www.heyns.co.za

HEYNS AND PARTNERS INC
ATTORNEYS CONVEYANCERS NOTARIES

Cornelia van Heerden joined Heyns and Partners Inc in 1990 as an attorney and conveyance. She was appointed a director in 1993. Cornelia specialises in High Court litigation in the area of claims for damages in respect of personal injuries, damages resulting from property transactions and contracts, and family law.

Heyns and Partners Inc. was founded in 1958. In 1986, the firm started to operate and conduct business under its current name. It is privileged to represent a very diverse and extensive client base, both corporate and individual, offering litigation, conveyancing and notary services.

International Dispute Resolution Practice Group Meeting Cancun, Mexico

By Dr. Karl Friedrich Dumoulin

Soon, our active practice group will meet again during the GGI World Conference in Cancun, Mexico, on 01 November 2013.

The focus of our upcoming practice group meeting lies on Electronical Discovery (e-discovery), since this highly interesting and up-to-date topic met such great interest during the group meeting at the past GGI European Conference in Lisbon, Portugal, in April 2013, where Patrizia Giannini held a presentation on "Electronic discovery – (EU versus US)". She shared an extremely interesting account of the controversies between US discovery rules on the one hand and European Data Protection law on the other and her contribution led to a lively debate and an exchange of information on the situation in the attendee's countries. Due to the lack of time it was not possible to discuss every detail.

In the upcoming group meeting in Cancun, the lively discussion will be continued and with presentations from Seiichi Yoshikawa and Luis Montes, the meeting attendees will get a deeper inside on how e-discovery is arranged in Japan and Latin America and Electronical Discovery in general.

This year's
GGI World Conference
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GGI Geneva Group International AG
Schaffhauserstrasse 550
8052 Zurich, Switzerland
T: +41 44 256 18 18
E: info@ggi.com
W: www.ggi.com
W: www.ggiforum.com

Responsible Editor in charge of International Dispute Resolution Contents:
Dr. Karl Friedrich Dumoulin
Global Vice-Chairperson of the GGI International Dispute Resolution Practice Group
c/o GGI member firm
FPS Rechtsanwälte & Notare
Law Firm
Königsallee 60 C (KÖ-Höfe)
40212 Dusseldorf, Germany
T: +49 211 30 20 15 0
E: dumoulin@fps-law.de
W: www.fps-law.de