Discussion Report: Cross-border Negotiated Deals

by

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The fourth panel was devoted to Cross Border Negotiated Deals with Prof. Heike Schweitzer, (EUI, Florence), Hubert Segain (Herbert Smith LLP, Paris) and Christopher C. King (Hunter Douglas Management AG, Rotterdam/Lucerne) as speakers.

Beate Sjåfjell (University of Oslo) followed up on the Professor Schweitzer's issue on legal transplants, i.e. identical terms with differing meaning (related to contracts). This concerns not only contracts but also EU legislation. As an example Beate Sjåfjell referred to the Takeover Directive and to the notion of company interest. This term has quite different meaning in legal doctrines of various (member) states. Beate Sjåfjell wanted to know how in the speaker's opinion one should approach this problem – would it be by trying to find a prevailing view, or a compromise between the diverging opinions, or should the notion be understood as an empty term to be interpreted with reference to the purpose of the directive only and as if it did not exist as a legal term in the member states?

Professor Schweitzer answered to this that that where one deals with the interpretation of an EC Directive, general principles of EU-law interpretation apply. This would imply that the meaning of a given term in different Member States is not determinative: Terms used in EU primary and secondary law are ultimately to be interpreted autonomously. The guiding principle for the interpretation is the concept of "effet utile". It is therefore likely according to Professor Schweitzer that the term "company interest" in the Takeover Directive would be interpreted with a view to the overall purpose of the Takeover Directive to abolish barriers to takeovers.

Mr. King enquired whether Professor Schweitzer saw the legal transplant of breakup fees as coming from the breakup fees relating to the sale of a whole publicly-traded company, which came into common use as a consequence of the *Revlon*[1]-doctrine, requiring a "fiduciary out".

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1 *Revlon v. McAndrews & Forbes Holdings, Inc*, 506 A.2d 173 (Del 1986).

Professor Schweitzer replied that the US-American practice of using breakup fees in public deals extends much beyond the “Revlon”-setting, i. e. cases in which the sale of a firm, or the sale of control within the meaning of the Revlon case law, has become inevitable. The doctrine of a “fiduciary out”, in response to which this practice has developed, is significantly broader than the Revlon-doctrine. It implies that in any public deal the target board of directors may not commit to a “no-talk”-clause which would oblige it not to negotiate with third party bidders after the contract has been signed. Rather, the board must remain free to negotiate where a third party bidder makes a superior offer between signing and closing. This follows from the fiduciary duties the board generally has vis-a-vis the shareholders of the target firm in any public deal. The fact that no equivalence to the Delaware “fiduciary out”-doctrine exists in German corporate law delimits the possibility of a functional comparison of the widespread US-American practice of using breakup fees in public deals and the (different) type of breakup fees used in Germany.