SELECTED ARBITRAL AWARDS

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EXTENSION OF ARBITRATION AGREEMENT TO SHAREHOLDERS

Annotation to Case C 16, C 20, C 21, C 49

The discussion of the extension of arbitration agreements to shareholders distinguishes two scenarios. First, it can be asked whether or not arbitration clauses concluded by business associations extend to their shareholders or partners, either automatically by virtue of law or by agreement. Second, and clearly distinguishable from this scenario, it can also be asked under which conditions arbitration clauses contained in statutes of corporations or partnerships extend to the shareholders or partners of such business associations. These scenarios have to be clearly distinguished and dealt with separately.

ARBITRATION AGREEMENTS CONCLUDED BY BUSINESS ASSOCIATIONS

An arbitration agreement concluded by a corporation (*AG - Aktiengesellschaft, GmbH – Gesellschaft mit beschränkter Haftung*) or by a general or limited partnership (*OG – Offene Gesellschaft, KG - Kommanditgesellschaft*), in principal, does not automatically extend to the shareholders or partners of such business associations.

Therefore, shareholders of an *AG* or *GmbH* cannot be sued under an arbitration agreement that has been concluded by the corporation.

Neither does an arbitration agreement concluded by a partnership automatically extend to the partners. Although partners of an Austrian *OG* are personally liable for claims against the partnership and can be sued for such claims, they are not automatically bound by arbitration agreements concluded by the *OG*.[1] The same is true for an arbitration agreement concluded by a limited partnership (*KG*). It does not extend to (personally liable) general partners (*Komplementäre*), neither to such partners which are not personally liable (*Kommanditisten*).

Of course the parties can agree that an arbitration agreement shall also extend to shareholders or partners of business associations but the respective partner or

[1] OGH 5.8.1999, 1 Ob 163/99y, WBl 2000, 41; *Oberhammer,* OHG im Zivilprozess, 124 ff; *Koppensteiner* in *Straube* I[3], Sec 128, mn 6; *Hausmaninger* in *Fasching/Konecny* IV/2[2], Sec 581, mn 216; *Rechberger/Melis* in *Rechberger*[3], Sec 581 mn 12; *Schauer* in *Kalss/Nowotny/Schauer,* Gesellschaftsrecht, mn 2/548; different opinion *Falkner*, Schiedsvereinbarung einer OHG, WBl 1989, 173; *Wünsch*, Schiedsgerichtsbarkeit in Handelssachen, 63 ff; *Reiner*, Schiedsverfahren und Gesellschaftsrecht, GesRZ 2007, 157; *see* also *Fremuth-Wolf* in Arbitration Law of Austria, chapt. 3.2: Arbitration Agreement and Third Parties, p 680; *Koller* in *Liebscher/Oberhammer/Rechberger* I, mn 3/312.

shareholder has to be a party to such agreement. Whether or not that is the case is either clearly deductible from the wording of the agreement or may be a matter of contract interpretation.[2] In any case, due to the in-writing requirement of Austrian law (Sec 583 *ZPO*) arbitration clauses must be concluded in writing and consequently the extension of the arbitration agreement to shareholders or partners, including the shareholders' or partners' consent, must either follow from the clear wording of the agreement or must at least be indicated and be deductible from the written instrument.[3]

ARBITRATION AGREEMENT IN SHAREHOLDER AGREEMENTS OR STATUTES

Frequently, arbitration clauses are part of shareholder agreements of partnerships (*OG*, *KG*) or statutes of corporations (*AG*, *GmbH*). According to Sec 581 (2) *ZPO* the arbitration law of the *ZPO* applies to such arbitration clauses as well.[4] Consequently, the in-writing requirement of Sec 583 *ZPO* applies also to arbitration agreements in shareholder agreements and statutes.[5]

Most importantly, arbitration agreements in shareholder agreements and statutes apply to the shareholders or partners of the respective business association. Because of the in-writing requirement, the shareholder agreement or statute has to be concluded in writing and thus has to be signed by all shareholders or partners in order for the arbitration agreement to be valid. Persons who join the corporation or partnership at a later point of time have to do so in writing in order for the arbitration agreement to extend to them as well.[6]

In addition, arbitration agreements in statutes and shareholder agreements also extend to the corporation or partnership itself, which can be sued under the arbitration agreement, as well as to managing directors and other statutory officers as far as claims directly related to the office are concerned (other than claims arising out of a respective employment contract).[7]

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[2] *Oberhammer*, OHG im Zivilprozess, 132.

[3] *Zeiler*, Schiedsverfahren[2], Sec 583, mn. 51.

[4] *see Oberhammer*, Entwurf eines Schiedsverfahrensrechts, 39; *see also Hausmaninger* in *Fasching/Konecny* IV/2[2], Sec 581, mn 306 *et seq*; different opinion *Reiner*, Schiedsverfahren und Gesellschaftsrecht, GesRZ 2007, 161; *see also* Koller in *Liebscher/Oberhammer/Rechberger* I, mn 3/330.

[5] Different opinion *Reiner*, Schiedsverfahren und Gesellschaftsrecht, GesRZ 2007, 160f; *see also Koller* in *Liebscher/Oberhammer/Rechberger* I, mn 3/335.

[6] OGH 18.3.2004, 2 Ob 53/04; *see also* OGH 25.1.1995, JBl 1995, 596; OGH 12.1.1971, SZ 44/2; OGH 25.6.1996, HS 27.826/1.

[7] *Koller* in in *Liebscher/Oberhammer/Rechberger* I, mn 3/349.

EXTENDING ARBITRATION CLAUSES TO NON-SIGNATORIES

The extension of arbitration clauses to non-signatories has frequently been discussed on the basis of various doctrines, including the group of companies doctrine, corporate veil piercing, alter ego, estoppel, *venire contra factum proprium*, representation and agency, confusion and fraud. Nevertheless, Austrian courts are very hesitant in extending arbitration clauses to non-signatories.[8] Despite this arbitral tribunals, including in arbitrations under the Vienna Rules and referring to the above enumerated concepts, sometimes have extended arbitration agreements to non-signatories.

In any case, arbitration agreements extend to legal successors, to third-party beneficiaries, as well as to the respective third parties in cases of assumed joint-liability and transfer of contract. However, an arbitration clause in a contract does not automatically extend to a non-signatory who undertakes to guarantee for the obligations of one of the parties to such contract. The guarantor is only bound by the arbitration clause if, in addition to guaranteeing certain obligations, he also commits himself to submit any disputes to arbitration. Whether or not such commitment is made is a question that has to be resolved by interpretation of the manifest intention of the parties.[9] Importantly, also in such case the general rule of Sec 583 (1) *ZPO* applies and thus the commitment to arbitrate, in order to be valid, must be made in writing.

[8] *Zeiler*, Schiedsverfahren[2], Sec 581, mn 104; *Hausmaninger* in *Fasching/Konecny* IV/2[2], Sec 581, mn 204.

[9] OGH 1 Rv 279/9, GIUNF 4624; *Koller* in *Liebscher/Oberhammer/Rechberger* I, mn 3/319; *Hausmaninger* in *Fasching/Konecny* IV/2[2], Sec 581, mn 221.

APPLICABLE LAW TO CERTAIN ASPECTS OF ARBITRATION PROCEEDINGS

Annotation to Case C 17, C 22, C 24, C 33, C 49

Arbitrators are not bound by any conflict of law rules in order to determine the applicable law in their proceedings. This is often criticised by legal scholars[1] and is the reason for the remarkable amount of case law and literature addressing this topic. Austrian Arbitration law is primarily based on the UNCITRAL Model Law on International Commercial Arbitration 1985 (MAL), which leads to a certain predictability regarding the determination of the applicable law to certain aspects of arbitration proceedings.

THE APPLICABLE LAW TO THE ARBITRATION AGREEMENT

Austrian law is silent in regard to the determination of the applicable law to the arbitration agreement. However, at least the "doctrine of separability" (of the arbitration agreement) is generally recognized by Austrian courts and legal scholars.[2] Hence, first and foremost, the applicable law to the arbitration agreement must be independently determined.[3] It might also occur that different laws apply to several elements of an arbitration agreement, *e.g.* the law applicable to establish whether an arbitration agreement has been validly concluded might be different from the law applicable to the form of the arbitration agreement.[4]

In a line of decisions the Austrian Supreme Court referred to the principles established by Art V(1)(a) NYC in order to determine the applicable law to the validity of an arbitration agreement (*Schiedsvereinbarungsstatut*).[5] Art V (1)(a) NYC stipulates that the applicable law to the validity of an arbitration agreement must be determined either according to a parties' choice of law governing the arbitration agreement or – in absence of such choice of law – according to the law of the country where the arbitral tribunal has its seat.[6] However, in contrast to these principles the Austrian Supreme Court regularly extents the scope of

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[1] *E.g. Schlosser,* Schiedsgerichtsbarkeit², mn 726 ff; *Nueber,* Transnationales Handelsrecht, 60.

[2] *See* already Annotation A 07 (*Haugeneder*).

[3] *Fasching,* Schiedsgericht, 32.

[4] *Koller* in *Liebscher/Oberhammer/Rechberger* I, mn 3/50.

[5] *Zeiler,* Schiedsverfahren², Sec 581, mn 125.

[6] OGH RS0045375.

application of a parties' choice of law governing the main contract also to the arbitration agreement and its interpretation.[7]

APPLICABLE PROCEDURAL LAW

Sec 577 (1) *ZPO* governs on the application of Austrian procedural law to arbitration proceedings conducted before an arbitral tribunal with its seat in Austria. In addition, the provisions listed in Sec 577 (2) *ZPO* also apply if the seat of the tribunal is outside Austria. These include *e.g.* questions of the form of the arbitration agreement, interim measures before Austrian courts or the recognition and enforcement of foreign arbitral awards. Furthermore, Sec 577 (3) *ZPO* stipulates that some provisions of the Austrian Arbitration law even apply if the arbitral tribunal has not yet been constituted, provided that one party's place of business, domicile or place of ordinary residence is in Austria. Sec 577 (3) *ZPO* predominantly addresses issues of the constitution of the arbitral tribunal.

However, most of the provisions of Austrian Arbitration law are of non-mandatory nature. Therefore, in most cases arbitrators are able to conduct the proceedings at their own discretion or according to the arbitration rules of an arbitral institution.[8]

THE APPLICABLE LAW TO THE FORM OF THE ARBITRATION AGREEMENT

Sec 583 *ZPO* stipulates certain form requirements for arbitration agreements.[9] Sec 583 *ZPO* applies whenever the arbitral tribunal has its seat in Austria. Due to the mandatory nature of Sec 583 *ZPO* a parties' choice of law in this respect must be ignored by the tribunal.[10] The form requirements stipulated by Sec 583 *ZPO* are to some extent even more liberal than Art II(2) NYC. Thus, according to Art VII(1) NYC parties can rely on the more liberal Austrian form requirements, if an arbitration clause does not (fully) meet the form requirements of Art II NYC.[11]

APPLICABLE LAW TO THE POWER OF ATTORNEY OF A PARTY REPRESENTATIVE

The applicable law to a party representatives' power of attorney to conclude arbitration agreements on behalf of his principal must be determined

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[7] *E.g.* OGH 30.3.2008, 7 Ob 266/08f.

[8] *Koller,* Das neue österreichische Schiedsrecht, Teil 2, JAP 2005/2006, 4.

[9] *See* already Annotation A 20 (*Rechberger/Hofstätter*).

[10] *Fremuth-Wolf* in Arbitration Law of Austria, Sec 583, mn 50.

[11] *Koller* in *Liebscher/Oberhammer/Rechberger* I, mn 3/201.

interpedently from both the applicable law to the arbitration agreement and the applicable law to the main contract.[12] Sec 49 *IPRG* constitutes a conflict of law rule in order to determine the applicable law to a power of attorney. According to Sec 49 IPRG either the law of the state where the representative is or is supposed to act on behalf of the principal or the law chosen by the principal apply to a power of attorney. Although Sec 49 IPRG is not directly applicable in arbitration proceedings it is possible that an arbitral tribunal applies the principles stipulated by Sec 49 *IPRG* in its proceedings as well. Such application might be based either on a parties' choice of law – as it was the case in C 24 – or by a *voie directe* approach of the tribunal, which would be in line with the recently advocated view that Sec 603 (1) and (2) *ZPO* apply by analogy also to the determination of the applicable law to a power of attorney.[13] Sec 603 *ZPO* governs on the applicable law to the merits of the dispute and constitutes a special conflict of law rule for arbitration. Sec 603 para 1 *ZPO* stipulates that the arbitral tribunal has to decide the dispute in accordance with the law or the rules of law that have been chosen by the parties. In absence of a parties' choice of law the arbitral tribunal must apply the law(s) it considers appropriate (*voie directe*). It is in the arbitral tribunal's discretion which law it applies.[14]

[12] *Aburumieh/Koller/Pöltner*, Formvorschriften, ÖJZ 2006, 445.

[13] *Koller* in *Liebscher/Oberhammer/Rechberger* I, mn 3/161.

[14] *See* further Annotation A 13 (*Platte/Schuch*).