TO OUR READERS

WELCOME TO THE ANNIVERSARY EDITION OF THE DRINSIDER, THE QUARTERLY NEWSLETTER OF THE WOLF THEISS DISPUTE RESOLUTION PRACTICE GROUP.

One year has passed since we have distributed the DRInsider to our readers for the first time and we are happy to celebrate our first birthday. Over the past year we have received various feedback and we are proud that the DRInsider attracts interest not only in the CEE/SEE-region but also in other parts of the WOLF THEISS network.

We will continue to provide our readers with regular updates on recent developments in the various jurisdictions of WOLF THEISS and we welcome any feedback or comments you may have.

Speaking of recent developments, there are currently many changes and amendments to procedural laws in the various jurisdictions of the CEE/SEE-region, either based on national or on EU legislation.

Since we are particularly keen to give you an impression on various WOLF THEISS events in the future, please have a look at our report on WOLF THEISS Ljubljana’s second Arbitration Day, an event attended by guests from prominent companies, the University of Ljubljana and the Ljubljana Arbitration Centre at the Chamber of Commerce and Industry of Slovenia.

We wish you happy holidays.

Best regards,

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CRIMINAL LAW

LENIENTY IN AUSTRIAN CRIMINAL LAW

As of 1 January 2011, leniency was introduced to the Austrian criminal law. It created a new system, as there is generally no possibility for people who are accused of having committed a crime to proactively approach criminal authorities in order to receive less or even no penalty in exchange for information. Because of this, the new provision regarding leniency was temporary and expires on 31 December 2016.

Although an analysis of the last five years showed that leniency was only applied in a very limited number of criminal proceedings, there are plans to prolong this provision. However, based on the

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experiences of the past years, the provision will come into force in an amended form on 1 January 2017. This article highlights some of the changes which are planned as of 1 January 2017.

According to the new provision, it is necessary that the person who wants to make use of leniency is suspected of having committed a serious crime (which is defined in the provision). In any case, it is necessary that the person reveals knowledge and information regarding criminal actions that exceed the ones he himself is accused of having committed. Furthermore, the provision aims to strengthen the element of voluntariness of the person which wants to make use of leniency. This person has to proactively approach the authorities, not vice versa. This is a reaction to criticism of leniency in criminal proceedings, as from several sides it was seen as kind of a “deal” with the authorities (as known from common law jurisdictions), which is not intended by Austrian criminal law.

The most important improvement is that the new provision stipulates the right of every person who fulfills the numerous requirements to make use of leniency. This is new since under the old version of the provision, only the Public Prosecutor had the authority to decide whether to make use of leniency towards a specific person. Under the new provision, a person seeking leniency has the right to object to the decision of the Public Prosecutor in case it refuses to apply the provision. Furthermore, it will be possible to claim the right of using leniency towards the court once the trial has already started. This ensures judicial control in all stages of criminal proceedings.

Leniency is still very new to the Austrian criminal law system. After the first five years, it seems that improvements to the provision will come into force as of 1 January 2017. It will be interesting to see whether the practical relevance of leniency will be increased as a result.

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NEW AMENDMENT TO THE AUSTRIAN CODE OF CRIMINAL PROCEEDINGS

Austria finally implemented Directive 2013/48/EU, strengthening the right of access to a lawyer in criminal proceedings. On 1 November 2016, an amendment of the Austrian Code of Criminal Proceedings (“StPO”) entered into force bringing significant improvements to protect the Attorney-Client Privilege. Finally, prosecution authorities are prohibited from seizing communications between defendants and attorneys outside the attorney’s office.

1. Before the Amendment

In Austria, the attorney’s right to deny testifying as a witness about information that was disclosed to him/her in his/her function as counsel to the defendant is stated in Section 157 StPO. This provision ensures the constitutional prohibition of procedural constraint to self-incriminate oneself.

To protect this Attorney-Client Privilege, Section 157 para 2 StPO prohibits circumventing the provision by such actions as seizing documents or data. However, jurisprudence stated that only communications located at the attorney’s office were considered privileged. Information and documents located outside the attorney’s office (e.g. the defendant’s apartment) could be subject to seizure measures. This harmed the rights of defendants and was also questionable within the meaning of Article 6 ECHR which guarantees everyone charged with a criminal offence the right to defend oneself in person or through legal assistance.

2. After the Amendment

The new Section 157 para 2 StPO clearly sets forth that data and documents that (i) were created for the purpose of consultation or defence either by the defendant or the attorney fall within the provision (ii) regardless whether the data or the documents are in possession of the attorney or the defendant.

In practice, this means seizing communications between attorneys and defendants is also prohibited in cases where these communications are located outside
the attorney’s office (e.g. at the defendant’s apartment). However, the requirement that all documents and data must have been created either by the attorney or the defendant raises questions. The concern is that this requirement will be interpreted as strictly as possible. Consequently, information that had been created by another person (e.g. a legal expert) and later handed to the defendant or the attorney would not fall within the provision.

In addition, communications that are in the possession of a third party (e.g. the defendant’s wife, another family member or a business partner) would still not be protected.

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BANKING & FINANCE

LITIGATION

ROMANIAN LAW ON DEBT DISCHARGE: CONSTITUTIONAL OR UNCONSTITUTIONAL?

The Law on Debt Discharge entered into force on 13 May 2016 and allowed for the discharge in full of any bank loans contracted by natural persons and secured by a mortgage agreement, subject to the conditions that the applicant (i.e. the debtor) is a consumer and the amount of the loan does not exceed the amount of EUR 250,000.

The scope of the Law on Debt Discharge was limited only to bank loans concluded for the purpose of acquiring/building/extending/modernizing/laying out/rehabilitating an immovable asset with residential purposes, or, irrespective of the purpose for which the bank loan was contracted, one of the security interests granted in favor of the bank is a mortgage over an immovable asset which has residential purposes. As an effect of the debt discharge, the mortgaged asset is transferred into the ownership of the bank.

However, the Law on Debt Discharge was not limited to certain debtors and should have been applied irrespective of the financial status of the debtor and his capacity to continue servicing their debt; hence it was likely to increase risks in the banking sector. For this reason, several banks raised concerns regarding the wide applicability of the Law on Debt Discharge to any debtors.

Due to such extended application of the Law on Debt Discharge, approximately 4,000 cases have been registered in the courts resulting from disputes between debtors and banks arising from the application of this law. In these pending cases the banks claimed that the Law on Debt Discharge violated the Romanian Constitution and the Romanian Constitutional Court was asked to rule on this issue.

On 28 October 2016, the Romanian Constitutional Court issued its decision and ruled that the provisions of the Law on Debt Discharge are constitutional only under certain circumstances. The Romanian Constitutional Court deemed that the Law on Debt Discharge can be applicable to debtors only subject to the occurrence of hardship in their specific case.

Therefore, it appears that the decision of the Romanian Constitutional Court is narrowing the application of the Law on Debt Discharge only to situations where the hardship (exceptional circumstances) can be proved in front of the court.

It is therefore certain that the courts will have from now on the duty to verify the circumstances raised by each debtor and to decide if there have been exceptional circumstances that can be remedied only by debt discharge.

We believe that one of the major effects of this decision will be noted in the number of cases pending in front of the Romanian courts as the banks now have a good reason to reject the debt discharge applications and ask the court for an assessment on the hardship occurrence. Hence, the number and complexity of court cases will most probably increase and we will see the development of a significant practice on the application of hardship.

HIGHLIGHTS FROM THE AUSTRIAN SUPREME COURT

No obligation of secrecy for attorneys regarding personal business accounts

In a recent decision, the Austrian Supreme Court upheld a prior ruling and further elaborated on the details to avoid future misconceptions. It stated that there is no attorney-client privilege in cases where an attorney seeks to obtain his or her consulting fees. This means the attorney is not obliged to secrecy in disputes regarding his or her own work-related business account. This also applies in cases where the attorney tries to defend alleged damages due to wrong or misleading consultancy advice. In the present case, it was alleged that the attorney gave poor consultancy advice leading to damages of EUR 2 million. The claim for damages was not brought forward by the client but by an assignee who acquired the entitlement by an insolvency assignment. The Supreme Court stated that the breach of secrecy does not only apply in disputes with the client and attorney as parties, but also when the legal consultancy advice is the subject of the dispute. Therefore, the attorney in this case couldn’t fight the claim by stating the assignment was invalid as he cannot defend himself further due to his obligation of secrecy to his former client. (4 Ob 138/16x)

Claudia Brewi
Different national enforcement procedures in EU Member States often slow down and significantly impede collection in cases of cross-border debt recovery.

The introduction of the European Account Preservation Order ("EAPO") allows creditors to secure collection of their claims in cross-border civil and commercial matters by freezing funds on debtor’s accounts in other Member States. Creditors will be able to obtain the EAPO in their Member States and enforce it without the need for additional recognition in the Member State of the debtor’s bank accounts.

Regulation (EU) No. 655/2014 of the European Parliament and of the Council on establishment of the procedure for the EAPO will begin to apply starting from 18 January 2017 with the purpose of simplifying cross-border debt recovery in civil and commercial matters ("Regulation").

The Regulation governs new European procedure for securing funds on debtors’ bank accounts. The procedure will be implemented alongside the already existing national procedures and enable creditors to request from the competent courts in their Member States to issue the EAPO, which the creditors will then be able to enforce in other Member States without the need for additional recognition. The competent court in the issuing state will be obliged to decide on the issuance of the EAPO within five to ten days from the date a request is submitted, depending on the circumstances of the matter.

Creditors which are not aware of the existence of debtor’s bank accounts in other Member States may file a request with the court from which they have requested issuance of the EAPO to provide them with the information on the debtor’s bank accounts. The courts should obtain such information from a corresponding authority designated for that purpose in other Member States.

After the competent court in the Member State of issuance has issued the EAPO, the entity competent for securing funds on the debtor’s accounts in the state of enforcement is obliged to enforce such EAPO and freeze the debtor’s account up to the amount provided in the EAPO. In order to avoid the possible use of funds on the bank account by the debtor, the debtor will be notified of the freezing of funds on the bank account only after the EAPO has been executed.

The process of enforcement of the EAPO will be executed through the procedure applied within the national framework for equivalent national orders of the Member States. To date, not all the Member States have adopted the necessary national legislation necessary for enforcement of the EAPO. In that respect, some Member States have not yet determined the local authority that will be in charge of the EAPO enforcement and providing information about debtors’ bank accounts. Below is the list of authorities that have been designated to assume the role:

- Austria: District Court Vienna Inner City (Bezirksgericht Innere Stadt Wien)
- Bulgaria: Ministry of Justice and enforcement officers (Ministerstvo na pravosadieto i sadebni izpalniteli)
- Croatia: Croatian Financial Agency (Financijska agencija)
- Hungary: Hungarian Association of Court Bailiffs (Magyar Bírósági Végrehajtó Kar)
- Slovak Republic: Slovak District court of Banská Bystrica (Okresný súd Banská Bystrica).

Implementation of the EAPO will not cause abandonment of the existing national procedures for securing funds on the account, but instead, the creditors in cross-border matters will have the option of choosing between the EAPO and the existing national procedure. The unified procedure of securing funds on accounts for enforcement of claims in cross-border
INTRODUCTION OF IP SPECIALIZED COURTS AND PRIVATE EXECUTORS IN UKRAINE

As part of ongoing judicial reforms in Ukraine, a system for specialized courts for lawsuits on IP rights was introduced. On 2 June 2016, the Ukrainian Parliament adopted the Law on Judicial System and Status of Judges, whereby the judicial system of Ukraine was substantially reshaped.

In particular, a two-tier IP court system was introduced, while other commercial disputes continue to be considered by the three court instances. Thus, the High Court on Intellectual Property will consider copyright, trademark and patent disputes in the first instance. In the second instance, its decisions will be reviewed by the Supreme Court of Ukraine. The new law stipulates that the High Court on Intellectual Property should be established and will begin operating by the end of 2017. Such innovation follows the international trend to create specialized IP courts. Such courts already exist in France, Germany, the United Kingdom, Portugal, United States, China and Japan.

Not only was the organizational structure of the Ukrainian courts changed, but the membership of the judges will also be increased. New judges will be elected to the High Court on Intellectual Property. Ukrainian patent attorneys or lawyers with relevant expertise of more than five years are qualified as candidates for these judge positions. This option should allow professionals in this sphere to become judges with practical expertise. It is expected that the new IP court system will allow considering IP cases in a much faster and more efficient way, thus better protecting the IP rights of the parties.

However, execution of any court decision is difficult in Ukraine today. To facilitate this procedure, new laws on enforcement have been adopted in June 2016. They introduced the institute of private judicial executors who will assist in the enforcement of court decisions (in addition to existing state executors). It is expected that private executors will start operating in 2017. This innovation is expected to significantly speed-up the execution procedure for court decisions taken in IP lawsuits.

THIRD PARTY LITIGATION FUNDING WITH REGARD TO CLASS ACTIONS IN POLAND

Third party litigation funding is a concept that is gaining popularity in the United Kingdom, Australia, United States and continental Europe.

In general, third party litigation funding means a situation when the funders agree to fund legal and other costs of a party to a dispute in return for a percentage of the damages and/or a multiple of the funding. Third party litigation funding is something different than a transfer of claims. It offers more and more complex financial instruments (regarding financing a dispute and risk sharing) and is more of litigation finance nowadays. However, the funds that are specialised in litigation finance only have started to look for promising projects in Poland. Therefore, Poland can be classified as an emerging market for third party litigation funding.

As in many other European jurisdictions, in Poland, third party litigation funding is not regulated. Therefore, as long as third party
litigation funding does not breach e.g. bar rules or statutory regulations regarding conflict of interest, client-attorney privilege or independence of the attorney handling the case, it can be described as an unnamed contractual relationship that is permissible in accordance with Article 353 of the Polish Civil Code.

In jurisdictions where the litigation finance sector is developed, class action cases are often financed by funds. However, in Poland, class actions are not as popular as in other countries. The reason for this is the large number of formal requirements that claimants have to meet in accordance with the Act On Pursuing Claims in Group Proceedings. As a result, according to official data published by the Polish Ministry of Justice, there were only 32 new class action cases in 2015. Nevertheless, in construction disputes in Poland, claimants (buyers of apartments) tend not to use the class action procedure, but to transfer their claims onto housing associations. This allows them to bypass the requirements of the class action procedure. This can be a good opportunity for litigation funding. Firstly, the value of construction claims is substantial. Secondly, the flow of new cases (new disputes) in the foreseeable future will be stable. Thirdly, a transfer of claims onto housing associations facilitates communication of the apartment owners with attorneys and the funders due to the fact that housing associations have an established structure and management board. Finally, the disputes tend to last long and generate significant costs. Therefore, third party litigation funding may be an interesting alternative in construction disputes in Poland as it may allow housing communities to avoid or minimise costs and risk connected with lengthy construction disputes with real estate companies.

NEW DRAFT AMENDMENT TO SLOVENIAN CIVIL PROCEEDINGS ACT

A Real Push towards More Expeditious Civil Proceedings or Just another Dead Letter?

After 8 years since the last major amendment to the Slovenian Civil Proceedings Act (Official Gazette of the Republic of Slovenia, No.: 26/1999, as amended, hereinafter: “CPA”), which entered into force on 1 October 2008, the Ministry of Justice decided it is time for a new overhaul. On 18 November 2016, a final draft of the new major amendment was concluded and is now being considered for adoption by the government.

According to the introductory notes of the draft amendment, its main purpose is to heal the festering wound of the Slovenian civil judicature - long proceedings. Furthermore, the draft amendment introduces certain new instruments in civil litigation proceedings which shall modernise the proceedings, keeping pace with the developments in other European countries having similar civil litigation proceedings systems (e.g. Austria, Germany).

The main proposed novelties of the amendment are as follows:

(a) Electronic service of documents: all documents shall be served to attorneys, public notaries, state authorities, bankruptcy administrators, etc, through their secured electronic inboxes.

(b) Cascade lawsuit: in case certain information that is needed for filing of a further claim of the plaintiff is held only by the defendant, the plaintiff may file a cascade lawsuit, containing two claims, whereby:

(i) with the first claim, the plaintiff requests disclosure of needed information;

(ii) the main claim is made by the plaintiff only after receiving the required information from the defendant.

(c) Limitation of the number of preparatory deeds: Unless the parties are requested otherwise by the court, each party may, after filing the lawsuit or reply thereto,
file only two further preparatory deeds. Such deeds, however, have to be filed 15 days prior to the preparatory hearing at the latest. The court shall not consider any preparatory deeds, which are filed after such deadline has already expired.

(d) Preliminary hearing: Prior to beginning formal civil proceedings, the court invites the parties to a preliminary hearing with the purpose to discuss legal and factual aspects of the case. The parties may also amend or supplement their statements on facts and evidences. The court may decide on all procedural issues and objections of parties.

(e) Proactive case management: After hearing the parties at the preliminary hearing, the presiding judge prepares a case management program containing:

(i) legal grounds which the court finds relevant for deciding the case, according to the claims of the parties;

(ii) a decision on the production of evidence as proposed by the parties;

(iii) the number and dates of court hearings which the court expects to hold in the case.

(f) Sanctioning the absence of parties from the preliminary court hearing: The party which does not attend the preliminary hearing cannot later claim a repayment of their costs with the proceedings in front of the first instance court.

(g) Final statements: Before conclusion of the first instance proceedings, the parties shall be given the possibility for their final statements (which can be time-limited). The parties shall sum up all their claims and ground their conclusions on the relevant facts.

(h) New possibilities for issuing of interim judgments: The court may issue an interim judgment also on the issue of the expiry of limitation period.

(i) Delivery of judgment: The judgment shall be delivered immediately after the conclusion of the first instance proceedings or within 8 days following the conclusion of the court hearing at the latest. The judgment can be declared orally by the judge - in such cases, the court shall issue a written "short judgment", stating only the claims and relevant facts, on which the claims were based, in 8 days after the judgment has been declared.

(j) Amendments to the appeal proceedings: If the judgment was declared by the court orally, the court shall issue a fully reasoned written judgment only if either of the parties announces that they will file an appeal. Such an announcement shall be made within 8 days following the receipt of the written "short judgment". The deadline for filing an appeal has been extended to 30 days following the receipt of the fully reasoned written judgment. The appeal is filed with the first instance court which delivered the first instance judgment. In cases where:

(i) the parties claim that violations of certain provisions of the CPA were made in the first instance proceedings; and

(ii) the first instance judge, after receiving and performing the initial check of the appeal (completeness of appeal, timeliness, etc.) realizes that the above claims are correct,

the first instance judgment may be replaced by a new judgment.

(k) Changes regarding the appeal on a point of law (revision): The appeal on a point of law is possible only if the case is accepted by the Supreme Court of the Republic of Slovenia based on the prior submission of the party (the accepted appeal on a point of law; dopuščena revizija). The justices of the Supreme Court may issue separate descending or confirming opinions of the decision of the Supreme Court.

If this new amendment is passed into law, the proposed solutions and instruments will require a much higher level of diligence and preparation of all participants in the proceedings at an early stage. Only time will tell if this will lead to a higher quality of first instance proceedings and consequently to better first instance decisions.

1 According to the Annual Report on Efficiency and Effectiveness of the Slovenian judiciary system in 2015, May 2016, publicly available (in Slovene) on the web site of the Supreme Court of the Republic of Slovenia: http://www.sodisce.si/sodna_uprava/statistika_
EU DIRECTIVE ON PROTECTION OF TRADE SECRETS: HOW DOES IT AFFECT AUSTRIAN CIVIL PROCEDURAL LAW?

On 5 July 2016, the Directive (EU) 2016/943 of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure (“Directive”) entered into force. The Directive is expected to become national law by 9 June 2018 at the latest.

The differences in the legal protection of trade secrets in the various jurisdictions within the EU were the reason for the European Union to provide rules that unify the laws of the Member States. By doing so, it ensures that the internal markets will be strengthened and there will be a sufficient and consistent level of civil redress (see recital 8 et seq).

In order to provide a common understanding, Article 2 of the Directive defines “trade secrets”.

*What affect does the Directive have on Austrian Civil Procedural Law?*

Article 9 of the Directive provides for certain rules when it comes to the preservation of confidentiality of trade secrets in the course of legal proceedings. Therefore, should we expect any relevant changes?

In Austria, trade secrets are protected by the Austrian Civil Procedure Code (“ZPO”). For example, in cases where the opponent keeps documents which are necessary for the other party’s reasoning, the court may instruct the opponent to disclose the documents. However, the instructed party may refuse to disclose the documents if trade secrets may be violated (see Section 305 para 4 ZPO). The ZPO also contains a similar provision regarding witness testimonies (see Section 321 para 1 no 5 ZPO).

In cases where the economic situation of a company is subject to proceedings, the protection of their trade secrets could be also granted by involving certain court experts who screen the relevant data and exclude parts of the documentation which could include trade secrets, or the expert can provide the court and the parties with an unobjectionable summary.

Based on this, it seems that there is little need to further adapt the Austrian ZPO, perhaps the definition of a trade secret will be implemented. In this context, it has to be noted that the Austrian Supreme Court has already referred to this Directive and stated that the present Austrian interpretation of trade secrets does not seem to compromise the achievement of the Directive’s objectives (see 4 Ob 165/16t). We will keep you updated if any relevant changes might occur.

RECENT AMENDMENTS TO SLOVAK CODE OF CIVIL PROCEDURE

As of 1 July 2016, three new procedural codes were enacted, bringing about the most substantial changes in Slovak procedural law since the adoption of the previous code of civil procedure in 1963.

The most notable one is the Civil Adversarial Code of Procedure (Civilný sporový poriadok, “CSP”), whereas two other procedural codes (Civil Non-Adversarial Code of Procedure and Administrative Code
of Procedure) regulate certain civil matters such as marriage dissolution and administrative matters. CSP is the current central civil procedural code. Unable to cover all the changes in their entirety, reference here is made only to the most substantial ones aimed at expediting trials and making court decisions more predictable.

The new procedural code stipulates that the principle of legal certainty must be observed, meaning that matters must be resolved in accordance with the decision-making practice of the highest judicial authorities. CSP thus lays down the basis for reliance on precedents in trials, such as Supreme Court rulings, until now – despite being often cited – were merely of ancillary nature and there was no legal basis for the lower courts to be bound by them. This provision embodies the legislature’s intent to strengthen predictability of court rulings and represents a very important new element in the Slovak civil procedural law.

CSP further introduced preliminary hearings in civil cases, meaning the court may order such a preliminary hearing prior to the commencement of a trial. Wherever possible and practical, the court will encourage the parties to reconcile or resolve their dispute via mediation, thus expediting the judicial proceedings. CSP also deals with frivolous lawsuits, meaning where a petition is clearly unsubstantiated, the judge may order the petitioner to withdraw the petition.

Substantial changes were also introduced regarding appellate proceedings. Under the previous regulation, a matter could theoretically be thrown back and forth between courts of first instance and appellate courts for many years – resulting in a very high average length of trials. An appellate court must now rule on the merits if the case has been returned to the court of first instance and repeatedly ruled on by that court.

The above-mentioned changes represent fundamental changes to the previous system of civil procedural law. Overall, the role of judges was strengthened by vesting more powers to them, such as the ability to order preliminary hearings. It will be interesting to observe how the courts will react and adapt to the new laws; either way they are undoubtedly an important step towards improving legal certainty and enforceability of law in Slovakia.

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ARBITRATION
ARBITRATION AND INSOLVENCY

To all insolvency proceedings opened before a court of an EU Member State after 26 June 2017, the Regulation (EU) 2015/848 of 20 May 2015 on Insolvency Proceedings (recast) will be applicable.

With regard to arbitration, the amended Article 18 of the Regulation clarifies that "The effects of insolvency proceedings on a pending lawsuit or pending arbitral proceedings concerning an asset or a right which forms part of a debtor's insolvency estate shall be governed solely by the law of the Member State in which that lawsuit is pending or in which the arbitral tribunal has its seat." The predecessor provision was Article 15 of the Regulation (EC) 1346/2000 of 29 May 2000 on insolvency proceedings which only mentioned pending "lawsuits", but did not include "arbitral proceedings". The consequence was that there was no explicit provision under EU law as to what law should be applicable if insolvency proceedings were opened.

This issue became relevant in the so-called Vivendi/Elektrim saga in 2009. A tribunal seated in London had to decide on the legal effects of the opening of insolvency proceedings over Elektrim before the Warsaw District Court. While Polish bankruptcy law provided that any arbitration clause concluded by the bankrupt should lose its legal effect and pending arbitrations should be discontinued, the English law had no such provision. The tribunal decided that a "pending arbitration" is considered to qualify as "pending lawsuit" under Article 15 of the old Insolvency Regulation and rejected Elektrim’s objection to jurisdiction. Both the partial award on jurisdiction and the final award on the merits were upheld by the English courts.
Therefore, if an arbitration is pending in Austria and insolvency proceedings are opened before a court of a Member State, the effects are governed by Austrian law. In three decisions of the Austrian Supreme Court (18 ONc 6/14y, 18 ONc 7/14w and 18 ONc 1/15i, all dated 17 March 2015), the Court decided in domestic cases that arbitration was to be suspended according to section 7 of the Austrian Insolvency Act. As a consequence, the claim (against the insolvent respondent) would have to be filed with the competent insolvency court. However, what is interesting to mention are the two obit a dicta: First, it did not call into question that the insolvency administrator is still bound by the arbitration agreement. Second, it referred to “recent” voices in legal literature that – in case the claim was contested by the insolvency administrator – the claim could be continued to be pursued before the arbitral tribunal (albeit changing the relief requested from performance to declaration).

**TWILIGHT OF ARBITRATION CLAUSES IN CZECH CONSUMER CREDIT AGREEMENTS**

On 1 December 2016, the new Consumer Credit Act became effective bringing a fundamental change to arbitration proceedings in the Czech Republic. The Act introduces a total ban on arbitration as a dispute resolution mechanism between credit providers and consumers. This means that from now on, all consumer credit disputes can be resolved by regular courts only.

Until now, it was possible to include an arbitration clause in agreements between credit providers and consumers and to solve potential disputes before any arbitration body (either a permanent arbitration court or an ad hoc arbitrator appointed for the specific case). However, this will completely change with the introduction of the new Act. The change should be beneficial to consumers as many experts believe that arbitration clauses were frequently abused by some credit providers as the stronger party.

Arbitration clauses in consumer agreements already underwent a major change five years ago. As a result of that change, sellers were obliged to include arbitration clauses in a separate document. The aim was to avoid “hiding” the arbitration clause in a vast contract or in business terms and conditions. However, it seems that this was still insufficient and that even further restrictions on arbitration, up to and including its complete prohibition, needed to be introduced. The new obligation follows the trend of the Czech courts which in recent years invalidated many concluded arbitration clauses and proclaimed them as being absolutely void. Although the trend in recent years has been to substantially limit entrepreneurs in negotiating arbitration clauses with consumers, arbitration was still very popular.

The above change only applies to new credit agreements, i.e. arbitration clauses entered into with consumers on or before 30 November 2016 will still be assessed according to the law applicable at the time of their conclusion. However, disputes arising from consumer credit agreements concluded after 1 December 2016 will be decided by the courts exclusively.

**WOLF THEISS LJUBLJANA 2ND ARBITRATION DAY**

On 27 October 2016, Wolf Theiss Ljubljana hosted its second Arbitration Day. The event was organized to provide an overview of pathological arbitration clauses in the practice of an arbitral institution and to provide an update on the role of arbitration in particular industries, such as energy and pharmaceuticals.

The program started with the topic of how arbitral institutions deal with pathological clauses. Mr. Djinović from the Ljubljana
Arbitration Centre at the Chamber of Commerce and Industry of Slovenia provided some examples of the most common pathological arbitration clauses, i.e. clauses which do not appear to make arbitration mandatory, refer to a non-existent institution, name a specific arbitrator or prescribe a combination of specific expertise that an arbitrator must master, even though it is not usual that persons are experts in such broad and different/opposing fields. In order to avoid the foregoing problems regarding pathological clauses, Mr. Peter Rižnik from the Ljubljana Arbitration Centre at the Chamber of Commerce and Industry of Slovenia discussed how to draft an efficient arbitration clause. It was emphasized that an efficient arbitration clause should include all of the following seven elements, i.e. the agreement to arbitrate, the scope, arbitration rules, number of arbitrators, language, seat of arbitration and applicable law.

The second half of the program focused on practical issues. Tobias Zuberbühler, Senior Lawyer from Lustenberger Rechtsanwälte in Zürich, held a presentation on arbitration in the pharmaceutical industry and highlighted important issues, such as arbitrability, confidentiality, experts, damage calculation and timing and costs. The formal part of the event concluded with a presentation from Wolf Theiss Budapest’s Zoltán Faludi, who provided insights on the Hungarian Energy Arbitration Court and highlighted certain legal issues in the practice (i.e. dealing with material adverse change, vis maior, take or pay clauses and the termination amount under the EFET master agreement).

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INSURANCE LAW

RENEWAL OF INSURANCE POLICY – CHANGE IN THE WORDING

On 14 November 2016, the Austrian Supreme Court ("OGH") published a decision dated 13 October 2016 (7 Ob 112/16w) that deals with the renewal of a combined policy and the question of how far a change in the wording to one class of insurance applies if the respective insurance continues.

The key facts of the decision involve an Austrian insured that bought a combined policy in 2001 that included the classes of fire, household, liability and legal expenses. The policy was taken out for 10 years. In 2011, prior to an expiry of the policy, the insurer contacted the insured to renew it. The renewal resulted in the allocation of a new policy number to the combined policy and stated that the legal expenses insurance would now refer to new general terms and conditions of insurance for that class of business. Whereas it was in the interest of the insured that the legal expenses insurance continued as it was agreed, the new general terms and conditions of insurance excluded an insured's claim for damages out of financial investments from legal expenses insurance.

The insured was not made aware of this exclusion but had invested in 2010 a substantial amount in bonds, which turned out to be worthless in June 2013 and probably related to a fraud case. The insurer denied coverage under both wordings for a claim for damages against the issuing bank because (i) the insured event was not notified during the sunset clause as stipulated for in the original wording, and (ii) the new general terms and conditions of insurance had exclusion for such a claim for damages. However, the insured argued that the issuing bank and the auditor of the issuer had actual knowledge of the issuer’s poor financial status at the time when the bond was issued but did not advise on that fact and it filed a claim for coverage against the insurer.

First of all, the OGH concluded that the insured suffered a loss already in July 2010 when it bought a worthless bond and subsequently, and this is probably more relevant for the insurance industry, it had to rule on which general terms and conditions of insurance the originally agreed to terms in 2001 or the new version of 2011 that contained the exclusion – would apply to the insured’s claim for coverage under the legal expenses insurance.

Considering Austrian civil law aspects for a novation (Neuerungsvertrag) and a change of debt (Schuldänderung), the OGH concluded that the parties did not wish to
terminate the legal expenses insurance agreement by the renewal, but quite the contrary. It was intended to continuously proceed by solely refreshing it. Neither the technically required new policy number for the combined policy nor that the legal expenses insurance was part of a combined policy would change that result in this case, according to the OGH. Consequently, the general terms and conditions that were in place at the time when the insured event occurred apply, i.e. in 2010, without triggering its sunset clause and therefore the insurer had to grant coverage for the insured’s claim for damages against the issuing bank under the old policy.

For the insurance industry and for reinsurers, it is worth noting that according to Austrian case law, an insured may be entitled to coverage under an old policy wording irrespective of a new policy number or new general terms and conditions that are thought to apply, as long as the specific class of business is considered as an ongoing business relationship between the insurer and its insured which needs to be established on a case-by-case basis.

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