



# DISPUTE DISPUTE RESOLUTION INSIDER

WOLF THEISS

## TO OUR READERS

Welcome to the 7<sup>th</sup> edition of the DRInsider, the quarterly Newsletter of the Wolf Theiss Dispute Resolution Practice Group. We are happy to again provide you with interesting news covering the various CEE/SEE jurisdictions in which we practice.

Following the European Union's increasing efforts to achieve a higher level of consumer protection, **Croatia** has introduced alternative methods for out-of-court resolution of contractual disputes between consumers and traders.

Looking back at the new **Polish** law on mediation, that came into effect on 1 January 2016, the number of mediation proceedings in civil cases in regional courts has risen considerably, not to say dramatically.

We give an overview of the new amendment to the **Slovenian** Competition Act implementing the Damages Directive which entered into force on 20 May 2017. A further article from our Ljubljana office deals with special judicial relief for holders of qualified financial instruments issued by banks.

In our usual Criminal Law section you can read about **Austria's** most prominent Business Crime offence namely breach of trust, as well as cyber attacks and debates in **Romania** on the amnesty of certain criminal offenses and educational punishments.

Further, our Vienna office takes a look at interim injunctions in the context of shareholder disputes and last but not least: the Austrian Supreme Court surprises arbitration practitioners in its recent decision dealing with a (mandatory) claim for compensation of a commercial agent.

Read inside to find out more.

Best regards,

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## CIVIL PROCEDURE

### RECENT CONSUMER PROTECTION DEVELOPMENTS IN CROATIA – ADDITIONAL BURDENSOME OBLIGATIONS FOR TRADERS

Ongoing development of consumer protection legislation throughout Europe, stimulated by the increasing efforts of the

European Union aimed at achieving a higher level of consumer protection, have also influenced the introduction of significant legislative developments in Croatia.

The Croatian Parliament recently enacted the Act on Alternative Consumer Dispute Resolution ("Act"), implementing the relevant EU legislation and introducing alternative methods of out-of-court resolution

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of contractual disputes between consumers and traders.

The Act contemplates a simplified, faster and less expensive method of resolving disputes stemming from sales or service contracts, putting the existing Court of Honor at the Croatian Chamber of Commerce center stage.

The Court of Honor is an honorary court that was established in 1989. It has been resolving non-monetary disputes of unfair business practices between members of the Croatian Chamber of Commerce, by which it was authorized to issue public warnings. Under the new Act, consumers can initiate proceedings before the Court against all traders having their seat in Croatia for violation of public morals and good business practices, even if such disputes contain cross-border elements.

Although the sanctions which may be imposed by the Court of Honor are limited to public warnings, the importance of these proceedings for the development of consumer protection arises out of the fact that any settlements reached between consumers and traders in disputes held before the Court of Honor represent directly enforceable deeds under Croatian law.

The Act also stipulates that traders need to amend the mandatory consumer rights notifications in order to inform consumers accordingly that they are entitled to initiate such out-of-court proceedings before the Court of Honor.

The initial reaction of traders shows a general aversion towards this alternative dispute resolution platform. Considering the fact that the Court of Honor is entitled to render a decision even in cases of non-participation of traders, traders will most certainly be forced to participate in these proceedings, which are expected to increase the number of settlements reached.

However, several major traders in Croatia have expressed an opinion that they are not legally obliged to participate in these proceedings before the Court of Honor; under the reasoning that the applicable regulations apparently do not explicitly stipulate their mandatory participation. Some traders have even gone further, by publishing official notices to consumers that

they do not recognize the proceedings before the Court of Honor as legally binding.

It remains to be seen how these legal developments will affect contractual disputes between consumers and traders, since there are several ambiguities related to the practical application of the Act. In this respect, further developments are expected shortly, since authorities have already announced that the audits of traders' compliance with the Act will commence soon.



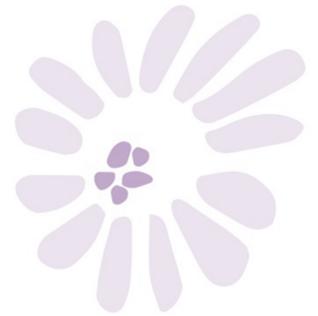
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## THE NEW POLISH LAW ON MEDIATION: ONE YEAR ON

**A civil law mediation institution was first introduced into the Polish legal system in 2005; however, the number of mediation agreements remained small. In order to make the use of mediation in civil matters more popular, especially in disputes between entrepreneurs, the Act of 10 September 2015 introduced a number of changes to the Polish Code of Civil Procedure. The changes were aimed at increasing the use of mediation, as well as to improving court proceedings and reducing associated costs. The new regulations came into effect on 1 January 2016.**

### What changed?

The new law obliges courts to encourage the parties to mediate. The principle of confidentiality of mediation has also been strengthened. Unless the parties decide otherwise, all persons involved in mediation proceedings are currently required to maintain strict confidentiality.

A new formal requirement was introduced for pleading. Parties must inform the court whether mediation or other out-of-court dispute resolution has been attempted. If not, the reasoning for the failure to mediate must be given.

Mediation may also be carried out in writ and injunction proceedings; which was not possible previously.

The court has the possibility of directing the parties towards mediation at each stage of the proceedings and in any situation in which mediation may facilitate a settlement of the dispute. In addition, the court is now obliged to advise the parties on the possibility of an amicable settlement of the dispute, in particular through mediation.

Procedural issues have been clarified by giving parties the ability to choose a mediator, or to introduce an institution to exclude a mediator in case of circumstances that raise doubts about his/her impartiality.

An important change is the extension of the mediation period from one to three months. The previous term proved to be too short and did not match the actual duration of mediation proceedings, which averaged around 40 days. The change is intended to make the duration of mediation more realistic. The 3-month deadline is designed to ensure the efficiency of the procedure, while ensuring that mediation can be carried out effectively.

The mediator has the right to use various methods to mediate. He/she may also assist the parties in formulating settlement proposals, or indicate other ways to settle.

Finally, the limitation of the claim, which is now reached at the time of the request for mediation, even if eventually the mediation is not initiated either due to the refusal of the other party or other circumstances not on the side of the applicant, has been changed.

#### The result

The statistics of mediation proceedings in civil and commercial cases show that, since 2005, the number of cases has been gradually increasing. However, this latest amendment caused a sharp increase in the number of cases in which the parties are referred for mediation. Since 2016, the number of mediation proceedings in civil cases in regional courts has increased by about 60%. In district courts, the increase was twofold. It is becoming more important to provide legal aid to entrepreneurs, both at the pre-trial stage, at the mediation stage, and at the stage of court proceedings.



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## CARTEL LITIGATION

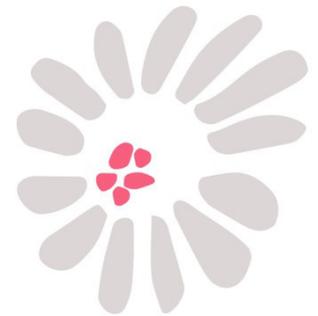
### EU DAMAGES DIRECTIVE TRANSPOSED IN SLOVENIA – WHAT'S NEW IN CLAIMING DAMAGES FOR ANTITRUST BREACHES?

**The amendment of the Slovenian Competition Act implementing the Damages Directive entered into force on 20 May 2017, and provides for a number of new substantive and procedural rules aimed at facilitating damages actions brought by injured parties against undertakings infringing EU or Slovenian competition law.**

Changes include prolonged limitation periods, exemptions from joint liability for SMEs, undertakings being granted immunity from fines, discretionary right of the court to determine the amount of harm, solutions for dealing with passing-on of overcharges and similar.

One of the most important changes concerns the disclosure of evidence, where the Slovenian legislator opted to provide claimants with a right to file a separate claim requesting disclosure. The claimants, however, may still decide to request an "ordinary" disclosure in accordance with the existing procedural rules. The court will only order a disclosure if certain conditions are fulfilled, in order to prevent "fishing expeditions" and to protect privileged communication (e.g. leniency statements or settlement submissions). The court can impose monetary fines of up to EUR 50,000 for actions contrary to a disclosure order.

Finally, the amendment introduced a rebuttable presumption that cartels cause



harm. Contrary to the general liability rules, claimants do not need to prove the existence of harm. However, this presumption raises several questions. Firstly, the practical value of the presumption is questionable as the claimants will still indirectly need to prove the existence of harm when proving the amount of harm. Secondly, it is unclear whether the presumption a priori establishes the causal relationship between the cartel and the harm. In connection to the latter, the Damages Directive expressly left this issue to be dealt with by Member States, which are required to observe the principles of effectiveness and equivalence. Thus it will be interesting to see what approach the Slovenian courts will adopt when deciding on future damages claims.



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## BANKING LITIGATION

### SPECIAL JUDICIAL RELIEF FOR HOLDERS OF QUALIFIED FINANCIAL INSTRUMENTS ISSUED BY SLOVENIAN BANKS

**In October 2016 the Constitutional Court of the Republic of Slovenia issued its decision No. U-I-295/13 on the constitutionality of provisions of the Banking Act (ZBan-1) which regulated the write-off of qualified financial instruments. The decision affected a large number of subordinated bond holders and shareholders of various Slovenian banks, whose financial instruments were written-off by the decisions of the Bank of Slovenia. The decisions were adopted during the rehabilitation of the Slovenian banking system after the financial crisis in December 2013.**

The declared unconstitutionality of provisions for the protection of shareholders and creditors in the event of a decision on emergency measures shall be remedied on the basis of the new Act on Judicial Relief

Granted to Holders of Qualified Bank Instruments (the "Act"). The Act aims to provide effective judicial relief to the injured parties in terms of accessibility to information, burden of proof, and joining of litigation procedures.

The subject of judicial relief under the new Act will be determined in a litigation proceeding; the beneficiaries of which will be the former holders of qualified financial instruments issued by the banks, who were adversely affected by the decision on extraordinary measures of the Bank of Slovenia.

The most important points of the newly proposed procedure are the following:

- limited circle of persons who are entitled to file an action against the Bank of Slovenia due to cancellation of qualified financial instruments issued by a bank;
- deadline to file an action is six months from the implementation of the Act;
- damages shall be paid by the Bank of Slovenia only if its liability is proven, otherwise the Republic of Slovenia shall cover the damages;
- specific formula for the calculation of damages is provided;
- possibility of joint processing of multiple lawsuits;
- the court may issue only one judgement for all parties injured from one particular decision of the Bank of Slovenia which will have effect also for those parties who did not file actions for damages;
- joint representative to be appointed to protect the rights of those injured persons who did not file actions for damages; and
- two-stage access to information.



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### HIGHLIGHTS FROM THE AUSTRIAN SUPREME COURT

**A gynaecologist is liable for a subcontracted pathologist's diagnosis**

The Austrian Supreme Court has ruled that if a gynaecologist does not specifically point out to a patient, that he/she only considers parts of the yearly routine cancer check-up his/her area of responsibility, then he/she is liable for diagnostic mistakes by the servicing pathologist.

For years the claimant/patient let her gynaecologist perform cancer smear tests. The patient was never explicitly told by the gynaecologist who actually examined the respective tests. After six years the defendant informed the patient of a "positive" result following her most recent test. Cervical cancer at a well-advanced stage was detected. If the correct procedure had been carried out in previous years, early indications of cancer would have been found. Consequently, as this was not done, extensive surgery needed to be performed. This resulted in lasting physical and psychological impairments.

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## CRIMINAL LAW

### BREACH OF FIDUCIARY DUTY: ABUSE OF POWER BY MANAGING DIRECTORS

One of the most discussed provisions of Austrian business criminal law is breach of fiduciary duty (*Untreue*) according to Art 153 StGB (*Strafgesetzbuch – Austrian Criminal Code, StGB*). This offence is committed by any person who knowingly abuses his or her authority (e.g. as managing director or authorized officer) to dispose of property of another person or to engage another person thus causing a financial detriment to the other person.

The perpetrator must act knowingly with regard to the abuse of authority, meaning that he/she knows for certain that in carrying out the action his/her authority to dispose of property is abused. Furthermore, he/she must act with at least conditional intent with regard to the damage of the principal, meaning that he/she was at least aware of a substantial risk that the damage will occur and, having regard to the circumstances, took the risk.

In cases in which the internal relationship between the principal and the alleged perpetrator contains certain restrictions (e.g. an obligation to obtain a permit in case of contract values beyond a certain threshold) it is rather easy to assess whether such restriction was violated and therefore the power to represent was abused. However, Art 153 does not only address cases in which internal restrictions were clearly agreed. In fact, numerous managing directors of companies are not bound to such restrictions in the internal relationship with the company. Furthermore abuse of power is obviously also possible in cases in which a certain threshold which triggers an obligation to obtain permission exists, but was not exceeded in the case at hand.

In this light the Austrian Supreme Court recently strengthened the principle that the managing director of a company is always bound to use his/her authority only for the benefit of the company and to protect the interests of the company with the diligence of a proper business man in order to avert damage (RIS-Justiz RS0131129).

For managing directors this shows that it is essential to comply with these principles which are in line with the business judgement rule, in order to avoid criminal liability.



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### CYBER-ATTACKS UNDER AUSTRIAN CRIMINAL LAW<sup>1</sup>

The latest worldwide cyber-attacks once again raised awareness of the problems of cyber-crime and digital extortion. Recently several hospitals, banks, telecommunication- and other companies were subject to a so called "WannaCry ransomware attack". This refers to a hacker-attack through a computer virus named "ransomware cryptoworm" which targets computers running the windows operating system by encrypting data and demanding ransom payments.

Digital extortion can be defined as the illegal access of a computer system by overcoming security measures, planting malware to encrypt data and subsequently demanding ransom payment for decrypting it.

Cyber-attacks constitute criminal violations according to the Austrian Criminal Code ("ACC"). The classification of these hacker attacks has however proven to occasionally cause some difficulties.

Generally, any person who gains access to a computer system, which the person is not authorized to use (or not authorized to use by himself/herself) or who partially gains access to a computer system by overcoming specific security settings may be committing a criminal offence according to sec 118a ACC. This provision is also referred to as the "hacking provision" of the ACC. Notwithstanding this, although planting a so called "cryptoworm" on a computer complies with the physical element of the offence, additional elements of the provision require the offender to act with dishonest intent to (i) obtain personal data or (ii) use the knowledge of the obtained data to the disadvantage of a third party. With regard to the recent "WannaCry ransomware

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The previous court of law instance rejected the claim for compensation for pain and suffering against the gynaecologist. It found that only the pathologist was liable for the incorrect diagnosis.

The Austrian Supreme Court did not confirm this ruling and awarded compensation for pain and suffering in the amount of EUR 35.000 to the patient. The court ruled, that the patient, who had her doctor perform regular cancer check-ups, can presume that the gynaecologist takes responsibility for all sub-procedures. If a doctor does not specifically point out that he/she'd is subcontracting another specialist, then it must be assumed that liability for the pathologist as vicarious agent lies with the doctor. (1 Ob 161/16g)

*Christina Barzal*

attack" the respective computer systems were indeed illegally accessed, the offender however only encrypted the data on the computer; personal data was not obtained or used in the meaning of sec 118a ACC. In case of a "ransomware cryptoworm" attack the elements of an offence of sec 118a ACC are therefore not entirely fulfilled.

Since a victim is not able to access its own data after a "cryptoworm attack" – at least for a certain period of time – a criminal offence may also result from sec 126a ACC (damage to electronic data). Besides altering, deleting and rendering useless data this provision also covers its suppression.

In case the "cryptoworm attack" causes disruption to the attacked computer system a criminal offence may also derive from sec 126b ACC. With regard to digital extortion this is however typically not the case.

The demand of ransom payment in return for decryption of the encrypted data constitutes a prominent element of the "WannaCry ransomware attack". Therefore, as the offender threatens the victim with continuing the suppression of data and coerces the victim into making the ransom payment, the crime of (digital) extortion according to sec 144 ACC is fulfilled.

Although the attack on monetary funds is broadly protected by Austrian criminal law, also with regard to cyber-attacks such as digital extortion, Austrian criminal law still lacks full protection against preparatory measures to this criminal offence e.g. illegal accessing of a computer system.

<sup>1</sup> This article explicitly covers Austrian criminal law. Possible violations resulting from provisions on data protection have not been taken into account.



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## DEBATES CONTINUE IN ROMANIAN PARLIAMENT OVER THE AMENDMENT OF A CONTROVERSIAL DRAFT AMNESTY LAW

**Starting in January 2017, the Romanian Parliament initiated public deliberations on Draft Law no. 17/2014 on the amnesty of certain criminal offenses and educational punishments (the "Law"). The Law has the intention of improving the conditions of inmates in Romanian prisons in accordance with the standards imposed by the European Court of Human Rights ("ECHR").**

Romania faces fines from the Council of Europe if it does not comply with ECHR Pilot Judgement of 25 April 2017 <sup>1</sup> and draft a schedule of proposed measures.

The Law provides that all criminal offences with punishments of up to five years are granted complete amnesty and that criminal offenses carried out by pregnant women or by persons who are the sole guardian of a minor are granted amnesty with half of the applied punishment.

The amnesty, however, does not apply to a wide range of severe criminal offenses such as attempts at a person's life or assets, abuse of office or conflict of interest. Moreover, the Law provides that the amnesty applies only if the criminal offender completely covers the damages caused to the aggrieved party.

The Law raised concerns following highly controversial amendments proposed during deliberations in the Senate; namely attempts to grant amnesty for corruption offenses. However, these amendments have not been approved by the Senate, which passed the Law tacitly according to article 75 (2) of the Romanian Constitution as the deadline of sixty days to decide on the Law had expired. Therefore, the Law has been sent to the Chamber of Deputies for a deciding vote.

The Law has already sparked significant opposition, and received a negative review from the Superior Council of Magistrates. The main critics highlight the fact that no serious impact studies have been conducted

## HIGHLIGHTS FROM THE AUSTRIAN SUPREME COURT

### Pepper-Gate

In 2016 a hotel guest raised claims against her travel agency due to an incident at the breakfast buffet involving pepper.

A lot can happen due to faulty supervision in today's highly technologized world. If a mechanic forgets to check your tires, it can result in bodily injuries as well as damage in property. The same goes for architects who overlook a miscalculation in a building plan, an IT-engineer who slips an error into his program code or a lawyer who overlooks a deadline.

Errors like that will of course be punished and the culprit will be held responsible for his mistakes. Rightfully one could argue, following the famous saying "with great power comes great responsibility".

But according to the Austrian Supreme Court, it doesn't even need mediocre power to be held responsible. Sometimes a piece of vegetable is all it takes.

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to identify alternative ways of improving the conditions in Romanian prisons and that other reeducation methods should be considered.

The actual impact of the Law remains to be determined, although the eagerness of Parliament to promote this debatable law appears to have reduced considerably.

<sup>1</sup> Joint cases nos 61467/12, 39516/13, 48231/13 and 68191/13 (*Rezmiveş et al*).



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## CORPORATE LITIGATION

### WHAT TO DO IF THE MAJORITY SHAREHOLDER IS ABOUT TO BREACH A SHAREHOLDERS' AGREEMENT AND TRIES TO TAKE CONTROL OVER THE COMPANY?

**This was the question confronting our client, an Austrian limited liability company. A few years ago, our client established a joint venture company (the "JV") with his partner F-Co. Our client held a share interest in the JV amounting to 45%, while F-Co held 55% of the shares.**

In addition to the articles of association, our client concluded a separate shareholders' agreement with F-Co. This agreement was intended to secure our client's influence on the management of the JV. It also included a provision according to which both the appointment and dismissal of managing directors requires a two third majority of the shareholders' votes. In addition, the shareholders were obliged to exercise their voting rights accordingly. Therefore, according to the shareholders' agreement, resolutions regarding a change of management could only be passed unanimously. This was a deviation from the general rule provided for in section 39 para 1 of the Austrian Act on Limited Liability Companies that provides for a simple majority of the votes cast at the shareholders' meeting.

The JV had two managing directors, each representing the interests of the respective shareholder. Due to different approaches in the management of the JV, a shareholders' meeting was convoked with the aim of dismissing our client's managing director with immediate effect. Unimpressed by our client's referrals to the respective provisions in the shareholders' agreement, F-Co declared that the resolution on the dismissal of our client's managing director would be passed in the upcoming shareholders' meeting – regardless of the clear provisions in the shareholders' agreement. In fact, the majority shareholder would have been (legally) able to pass a resolution on its own, i.e. without the approval of our client, because in relation to the company only the articles of associations are decisive.

In light of these facts our client filed an application for an interim injunction intending to prevent F-Co from exercising its voting rights in violation of the shareholders' agreement. The application was mainly based on a ground-breaking decision of the Austrian Supreme Court (case no. 7 Ob 59/03g).

The court agreed with our arguments and approved the application within two working days. The court ruled that F-Co may not adopt a resolution on the dismissal of a managing director without our client's approval. F-Co has filed an appeal against this ruling but it has not yet been decided upon by the Higher Regional Court of Vienna.

Consequently, if a clear breach of a shareholders' agreement is imminent, the affected shareholder should consider applying for an interim injunction to secure its legal position.



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In 2016 a hotel guest was about to get her well-deserved breakfast from the buffet when the accident happened. Fully focused on the culinary delights unfolding in front of her, she didn't notice the malicious piece of pepper that somehow found its way to the floor and slipped on it. For the suffered injuries the women then raised claims against the travel agency.

The Supreme Court ruled that, if a well visible piece of pepper is already on the floor when the employee inspects the buffet area and he doesn't remove it, it's to be seen as a breach of due diligence and therefore damages claims are to be granted. Furthermore the court stated that it doesn't depend on how long the vegetable was lying on the floor, as long as the act of picking it up can be seen as a reasonable and effective measure to avoid such an incident. According to Austrian law this justifies not only the liability of the employee, but also of the hotel as well as the travel agency, although the court decided on joint guilt to an extent of 50% as it can be expected from a guest to keep an eye on the floor while walking.  
(1 Ob 158/16s)

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## ARBITRATION

### AUSTRIAN SUPREME COURT SURPRISES ARBITRATION PRACTITIONERS

**In an “ordinary” commercial matter, an Austrian commercial agent filed a claim for payment of compensation before the Austrian courts against a principal having its seat in the USA.**

The claims were based on provisions of the Austrian Law on Commercial Agents. The respondent objected to the jurisdiction of the courts arguing that their contractual relationship was subject to an arbitration clause and that arbitration had already been initiated before a tribunal seated in New York, USA. As a partial award had already been rendered in that arbitration, the matter had, according to the respondent, also become a *res iudicata* as the claimant in the court proceedings raised the allegedly same claims as set-off claims in the arbitration in New York.

The court of first instance rejected the claim for lack of jurisdiction which was upheld by the court of second instance. The Supreme Court, however, overturned these decisions for the following reasons:

First, the Supreme Court had to decide which substantive law was applicable to the contract in general and to the issue of set-off in particular. It concluded that according to the parties’ contractual choice of law, it was the law of the state of New York. Second, with reference to Article II (3) of the New York Convention, a court must refer the parties to arbitration if the subject-matter is governed by an arbitration agreement unless the arbitration agreement is null and void, inoperative or incapable of

being performed. According to the Supreme Court, the court may fully review the validity and effectiveness of the arbitration agreement and is not limited to a *prima facie* review. The corresponding provision in the Austrian arbitration law is Section 584(1) second sentence and orders that a claim may not be rejected if the court finds that the alleged arbitration agreement is inexistent or inoperable. An arbitration agreement may be considered ineffective if the parties’ intention was to exclude the application of mandatory procedural or substantive provisions.

The Supreme Court then further referred to European Union (EU) law and the case law of the European Court of Justice according to which apparent violations against fundamental provisions of EU law constitute a violation of the public order. Such public order may also be considered to limit the arbitrability *ratione materiae*. The Austrian Law on Commercial Agents is an implementation of the corresponding EU Directive. In the “Ingmar” decision of the European Court of Justice, the Court ruled that this Directive is applicable irrespective of the parties’ choice of law if the underlying facts have a strong connection to the EU. According to general understanding, the European Court of Justice has thereby held that claims of a commercial agent have an internationally mandatory character (“Eingriffsnorm”). Such provisions cannot be ruled out by party agreement and are applicable even if the conflict rules refer to some other national law. The German Federal Court has also held that the provisions on the compensation for commercial agents under the EU Directive cannot be overruled by an agreement of parties on a jurisdiction the courts of which do not respect these provisions.

Finally, the Supreme Court concluded that the claimant has a mandatory claim for compensation which would not be recognised under the parties’ agreement on arbitration in New York and on the application of the substantive law of New York. The Supreme Court thus held that the arbitral clause in the contract was not effective and the claim filed by the claimant was to be admitted before Austrian courts.



**Comment:**

It is arguable whether the arbitration agreement is really ineffective or inoperable (under Article II(3) NYC or section 584 ACCP respectively) just because it provides for arbitration in New York and New York law as applicable substantive law. A prudent arbitral tribunal seated in New York may very well be able to decide a matter in compliance with (mandatory) EU or

national law on commercial agents, in particular if the future award will have to be enforced in a EU member state.



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