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Form Requirements For Authorisations To Enter Into An Arbitration Agreement: The Austrian Perspective

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In its decision 6 Ob 195/17w dated 17 January 2018, the Austrian Supreme Court decided that the form requirements for an arbitration agreement also apply to the authorisation to an agent to enter into an arbitration agreement (or a contract containing an arbitration agreement).

I. Stopping the movement towards a liberalisation of form requirements

Austria is among the few countries requiring a special type of authorisation to enter into an arbitration agreement ("*Spezialvollmacht*") which must also be in writing. Since the revision of the Austrian Commercial Code ("ACC") in July 2007, the legislature decided to drop the requirement of a special authorisation when it comes to the (i) power of procuration ("*Prokura*") and (ii) general corporate authorisation. They are now deemed to implicitly encompass the authorisation to enter into an arbitration agreement, unless provided differently. This legislative change aimed at finally harmonising the requirements for concluding the contract which includes the arbitration agreement with those of the arbitration agreement itself, in order to avoid the unwanted situation where the contract was validly concluded whereas the arbitration agreement was not. However, the question remained whether, despite removing the requirement for such separate special authorisation within the mentioned context of the ACC, the authorisation was still subject to a written form requirement. Whether the authorisation must take the same form as the act for which it is intended will, in principle, depend on the purpose of the respective form requirement.

Historically, the written form requirement for the arbitration agreement (and the respective authorisation) served both an evidentiary and a warning function, to protect the parties from waiving access to judicial remedies lightly. The 2006 reform of the Austrian arbitration law loosened this strict writing requirement with the adoption of section 583(1) of the Austrian Code of Civil Procedure ("ACCP"): E-mail correspondence or other means of correspondence exchanged between the parties are now deemed to satisfy the writing requirement as long as they provide "proof of the agreement". According to the prevailing view, these "new" and less stringent forms of the writing requirement would hardly carry a cautionary effect anymore. Hence, the previously advocated warning function of the provision has arguably lost its significance.

Furthermore, when it comes to international business transactions between commercial parties, arbitration as a dispute resolution mechanism can be said to have become the rule as opposed to the exception. Parties often want to avoid ending up before national courts where proceedings could be overly long and additional uncertainties might exist. Therefore, the warning function has to a large

extent lost its purpose. However, despite these clear trends of moving away from the historical warning function of the writing requirement, the Supreme Court took a protective stance and decided to continue embracing it.

II. The Supreme Court's conservative approach

In essence, the facts of case 6 Ob 195/17w are as follows: The respondents in the case were partners in buying and developing real estate with the help of contractors. For one of their properties, respondent A orally gave respondent B the authorisation to manage the development in both their names with the contractor. Accordingly, respondent B signed a contract with the claimant on his and respondent A's behalf, which included an arbitration agreement.

When a dispute arose, the claimant commenced proceedings before the Austrian courts, claiming compensation. In response, the respondents raised a jurisdictional objection in favour of arbitration due to the arbitration agreement contained in the contract between the claimant and respondents. The issue before the Supreme Court was whether a valid arbitration agreement had formed between the parties.

The Supreme Court decided that an arbitration agreement was only validly concluded if the authorisation to an agent followed the same form requirements as those imposed on the arbitration agreement by section 583(1) ACCP. Hence, even in a commercial context, an authorisation that was given only orally would not suffice. It held that the arbitration agreement had therefore not been validly concluded between claimant and respondent A, the effect of which, according to Austrian case law, also extended to respondent B.

The Supreme Court gave two main reasons for its decision to tie the form requirements for the arbitration agreement to the authorisation to an agent to conclude such an agreement: First, it made reference to the draft bill of section 583. In particular, during the revision of section 583, the draft bill included an express provision that the form requirements for the arbitration agreement would not apply to the authorisation to enter into an arbitration agreement. However, this addition was eventually removed so that the law in its final form did not include such clarification. Hence, although it was considered to explicitly exclude the form requirements of section 583 for the authorisation to enter into an arbitration agreement, the legislature decided not to adopt it.

Second, it explained the historical function of the written form requirement. Keeping the previous version of section 583 ACCP in mind, the Supreme Court discussed at length how the writing requirement mainly served the purpose to ensure that parties do not light-heartedly abandon their right to access judicial remedies. This, it held, was a valid reason which ought to be maintained even post-revision. The Supreme Court explained that by entering into an arbitration agreement, the parties waived their rights of having access to national courts, which gravely limited their possibility of appeal, and thus, their judicial remedy.

Accordingly, the writing requirement not only served an evidentiary but also a warning function which extends to the authorisation. Although the revision of the Commercial Code removed the requirement for a special authorisation to enter into an arbitration agreement in a commercial context, it did not pronounce itself on form requirements. The Court concluded that it was not possible to simply deduce that by removing the special authorisation, the legislature also aimed at adopting the same form requirements for the corporate authorisation as those for the main contract. Therefore, even within a commercial context, the authorisation to enter into an arbitration

agreement had to be in writing in accordance with section 583(1) in order to serve the said warning function.

This decision is a considerable step backwards from the progress of easing the form requirements for entering into an arbitration agreement in a commercial context. Although no additional special authorisation is required, an authorisation to enter into a contract containing an arbitration agreement must still be in writing, even if the contract would otherwise not require such specific form.

III. The scope of application of Article II of the New York Convention

In principle, the Supreme Court's decision would only be of relevance if the validity and form requirements of the authorisation to an agent to enter into an arbitration agreement were to be governed by Austrian law. The ACCP, however, provides for the application of section 583 even if the seat is either not yet determined or abroad, which gives section 583 an overriding mandatory character. Since the Supreme Court has decided that the section 583(1) form requirements equally apply to the authorisation to enter into an arbitration agreement, the question arises whether the overriding mandatory application of section 583 also extends to authorisations which could have an impact on enforcement actions before the Austrian courts.

It is, however, debatable whether the writing requirement for an authorisation to enter into an arbitration agreement would demand a stricter form requirement than Article II of the NY Convention. Since Article II of the NY Convention provides for the maximum standard which the Contracting States may impose, any stricter provision on form requirements in section 583 ACCP would be superseded. The NY Convention does not, however, include any provision on authorisation, questions of which could therefore be left to the applicable national law to answer. Nevertheless, according to Gary Born's treatise on International Commercial Arbitration, there is a substantial argument that Article II extends to related instruments concerning the formation of the arbitration agreement such as the authorisation.

Under this interpretation, the only form requirements imposed by the NY Convention are those that apply to the arbitration agreement itself. A lack of written form for the authorisation to an agent would therefore not provide grounds for challenging the validity of the arbitration agreement under the NY Convention. Or else, it would open the door to indirectly imposing stricter form requirements and contravene the Convention's aim to facilitate the enforcement of arbitration agreements.

The Austrian Supreme Court has not yet considered the interplay between section 583 and the NY Convention as the decision was rendered in a domestic context. Therefore, there is hope that this decision's impact can be confined to a domestic context.

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