Austrian Yearbook
on
International Arbitration
2010

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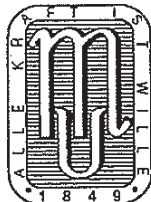

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The Arbitration of Corporate Disputes in Limited Liability Companies

Stefan Weber/Ewald Oberhammer

I. Introduction

The resolution of corporate disputes in Austrian companies with limited liability (LLCs) has traditionally been an important area of arbitration. Arbitration clauses can be found in the articles of association of many LLCs[1]). The main reasons[2]) for arbitration are

- the confidentiality of the arbitral proceedings,
- the experience of the arbitrators, and
- the enforcement of arbitral awards based on the New York Convention[3]) in cases with shareholder or assets in states outside the scope of the Brussels Regime[4]).

According to § 582 (1) of the ACCP[5]), "any pecuniary claim, within the jurisdiction of the courts of law may be made the subject of an arbitration agreement[6])". As company law disputes are always a matter of economic interest,

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[1]) Even though arbitration clauses in a number of article of associations may not cover disputes on shareholders' resolutions in a proper way.

[2]) Other reasons include the participation of the parties in the appointment of the arbitrators, and the relative quickness of arbitral proceedings due to there being only one level of jurisdiction. Awards, however, may be challenged in Austrian courts (three instances).

[3]) *UN-Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, BGBl 1961/200; *see, e.g.*, Albert Jan van den Berg (Ed.), 50 Years of the New York Convention (2009).

[4]) The "Brussels Regime" consists of the Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I Regulation, OJ L 12, 16. 1. 2001, 1–23), the Convention of 16 September 1988 on jurisdiction and the enforcement of judgments in civil and commercial matters (Lugano Convention I), and the Convention (of 30 October 2007) on Jurisdiction, the Recogniction and Enforcement of Judgments in Civil and Commercial Matters (Lugano Convention II) and governs the recognition and enforcement of foreign judgments; *see* Dietmar Czernich, Stefan Tiefenthaler & Georg Kodek, Europäisches Gerichtsstands- und Vollstreckungsrecht (3rd ed. 2009).

[5]) Austrian Code of Civil Procedure *(Zivilprozessordnung* – ACCP).

[6]) *See* Christian Hausmaninger *in* Hans W. Fasching & Andreas Konecny (2nd ed.

they are arbitrable[7]). The arbitrability of corporate disputes, including the voidance of shareholders' resolutions *(Anfechtungsstreitigkeiten)* pursuant to §§ 41ff of the LLC Act[8]), in general, is recognized by case law[9]). Further recognized is the arbitrability of disputes regarding information and inspection rights[10]) as well as other minority rights, such as the appointment of expert auditors[11]). Claims regarding payment of initial contributions (§ 10 of the LLC Act) are arbitrable under the new law, even though the Austrian Supreme Court denied arbitrability based on § 577 (1) of the ACCP (pre-2006 amendment).[12])

On the other hand, the arbitration of corporate disputes in limited liability companies has not been without legal challenges. Such legal challenges include:

2007), KOMMENTAR ZU DEN ZIVILPROZESSGESETZEN IV/2 §§ 577 *et seq:* GEROLD ZEILER, SCHIEDSVERFAHREN (2006).

[7]) Since 2006, it is irrelevant, whether or not and to what extent company law disputes are capable of settlement; *see e.g.* Christian Hausmaninger, *supra* note 6, § 582 ZPO annot. 19 *et seq.:* GEROLD ZEILER, *supra* note 6, § 582 ZPO; Andreas Reiner, *Schiedsverfahren und Gesellschaftsrecht,* GesRZ 2007, 151 at 152.

[8]) Act on Companies with Limited Liability (GmbHG), *see, e.g.,* HANS-GEORG KOPPENSTEINER & FRIEDRICH RÜFFLER, GMBHG-KOMMENTAR (3rd ed.).

[9]) OGH (Austrian Supreme Court), docket no. 2 Ob 276/50, *in* SZ 23/184 (Austria); OGH (Austrian Supreme Court), docket no. 7 Ob 221/98w, *in* RdW 1999, 206 (Austria); OGH (Austrian Supreme Court), docket no. 4 Ob 37/01x, *in* RIS Justiz RS0045318 (Austria); OGH (Austrian Supreme Court), 29 June 2006, docket no. 6 Ob 145/06a (Austria). The legal views are predominantly pro: Andreas Reiner, *supra* note 7, 152, MAX GELLIS & ERICH FEIL, GMBH-GESETZ (7th ed.), § 41 annot. 13, Karl Hempel, *Zur Schiedsfähigkeit von Rechtsstreitigkeiten über Beschlussmängel in der GmbH, in* LIBER AMICORUM HEINZ KREJCI, 1769 at 1780; con: HANS-GEORG KOPPENSTEINER & FRIEDRICH RÜFFLER, *supra* note 8, § 42 annot. 6; Rudolf Strasser *in* PETER JABORNEGG & RUDOLF STRASSER, AKTG (4th ed.) § 197 annot. 4; differentiating: Wilfried Thöni, *Zur Schiedsfähigkeit des GmbH-rechtlichen Anfechtungsstreits,* WBl 1994, 298. The arbitrability of corporate disputes is not affected by the statement in legislative materials (RV 1158 BlgNR XXII.GP, 9) that "with the expansion of arbitrability to pecuniary claims, there is still no conclusion on the arbitrability of company law because it depends on to what extent the arbitral decision has a constitutive effect on third parties *(Dritten gegenüber rechtsgestaltend wirken kann)*"; *see* Andreas Reiner, *supra* note 7, at 152. OGH (Austrian Supreme Court), 25 January 1995, docket no. 3 Ob 543/94, *in* JBl 1995, 596 (Austria).

[10]) OGH (Austrian Supreme Court), docket no. 6 Ob 16/84, *in* SZ 57/136 (Austria) concerning partnerships *(Kommanditgesellschaften); see* under German law OLG Hamm 7. 3. 2000, NZG 2000, 1182.

[11]) Andreas Reiner, *supra* note 7, 151, HANS-GEORG KOPPENSTEINER, *supra* note 6, § 42 annot. 6.

[12]) OGH (Austrian Supreme Court), docket no. 7 Ob 548/93, *in* WBl 1993, 404 (Austria). Based on § 577 (1) of the ACCP (pre-2006 amendment), the court reasoned that the obligation for the payment of the capital contribution (i) derives from mandatory corporate law and (ii) is not capable of settlement. Pursuant to § 582 (1) of the ACCP (post-2006 amendment), any pecuniary claim within the jurisdiction of courts may be governed by an arbitration agreement. It is therefore irrelevant, pursuant to the new law, whether or not and to what extent company law disputes are capable of settlement. Thus, the OGH judgment is not a precedent anymore. Con: Andreas Reiner, *supra* note 7, 151; the legal views were inconsistent, con: HANS-GEORG KOPPENSTEINER, *supra* note 9, § 10 annot. 2a and § 63 annot. 4; pro: JOHANNES REICH-ROHRWIG, GMBH-RECHT (2nd ed.), annot. 1/60.

- private persons being shareholders in a LLC considered consumers,
- corporate disputes with legal effect on all shareholders,
- corporate disputes with non-shareholders having an interest in the result of the proceedings,
- the entry of new shareholders in an LLC,
- the inclusion of a new arbitration clause in existing articles of association,
- the deletion of an arbitration clause in articles of association, and
- the adjustment of an arbitration clause in articles of association.

Some of these matters have been clarified, some issues are still controversial. The discussions center on different aspects of § 581 (2) of the ACCP pursuant to which the provisions of the ACCP on arbitral proceedings "shall also apply analogously to arbitral tribunals that, in a legally valid manner, are ordered ... by articles of association." *("sind auch auf Schiedsgerichte sinngemäß anzuwenden, die in gesetzlich zulässiger Weise ... durch Statuten angeordnet werden")*[13]). Significantly, the wording of § 581 (2) of the ACCP does not use the term "arbitration agreement" or "arbitration clause".

The misconception that arbitration clauses are "burdens" on the company or on the individual shareholders should be avoided. On the contrary, Austrian courts are not in the position to provide effective legal protection for companies which have assets or the shareholders of which are residents or have assets in countries where Austrian judgements are not but arbitral awards are recognized. Effective legal protection in such situations is only ensured through arbitration.

II. Private Persons as Consumer-Shareholders

Pursuant to § 617 (1) of the ACCP (ZPO) arbitration agreements between an entrepreneur and a consumer may only be validly concluded for disputes which have already arisen[14]). § 617 (2)–(7) of the ACCP (ZPO) regulate protective provisions for the benefit of the consumer in further detail[15]). Pursuant to § 1 (2) and § 1 (1) 2 of the Consumer Protection Act (KSchG), any person who does not engage in a self-employed business activity with a permanent structure, is a consumer; (Austrian) corporations are always entrepreneurs[16]).

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[13]) § 582 (2) last sentence of the ACCP contains a caveat ("Legal provisions outside this chapter according to which disputes may not, or may only under certain circumstances, be made subject to arbitral proceedings, remain unaffected hereby."). Apparently, there are no such exceptions in the area of company law.

[14]) *See* Bernd Terlitzka & Martin Weber, *Zur Schiedsfähigkeit gesellschaftsrechtlicher Streitigkeiten nach dem SchiedsRÄG 2006,* ÖJZ 2008/2, 1, 5 *et seq.:* Veit Öhlberger, *Sind Schiedsklauseln in GmbH-Gesellschaftsverträgen noch möglich?,* ecolex 2008, 51; Andreas Reiner, *supra* note 7, 151 at 164 *et seq.*

[15]) Andreas Reiner, *supra* note 7, 151 at 164 *et seq.:* Christian Hausmaninger, *supra* note 6, § 617 ZPO annot. 19 *et seq.:* Gerold Zeiler, *supra* note 6, § 617 ZPO.

[16]) *See* for Austrian corporations Brigitta Lurger & Susanne Augenhofer, Österreichi-

In particular § 617 (1) of the ACCP (ZPO) sparked discussions as to whether the consumer rules also apply to arbitration clauses in articles of association of LLCs. The issue of shareholders being considered consumers would arise in all companies in which private persons are directly invested, in particular, as business angels, private investors or in friends&family companies. On one side *Andreas Reiner*[17]) considers arbitration practically dead in the area of company law where consumers are involved. On the other side, *Bernd Terlitzka & Martin Weber*[18]) and *Veit Öhlberger*[19]) argue that the consumer protection rules are not applicable to arbitration clauses in articles of association.

The issue boils down to the relationship between § 581 (2) of the ACCP and § 617 of the ACCP.

§ 617 of the ACCP and, more general, the Consumer Protection Act regulate typical legal business relationships: on one side an entrepreneur with economic and informational advantages, on the other side a consumer who typically is inexperienced, both economically and legally. These entrepreneurial advantages shall be reduced and controlled through protective measures for the benefit of a consumer. In contrast, the corporate relationship governed by company law is focused on the attainment of a common purpose and is determined by a network of mutually required rights and obligations. Such relationship typically does not establish an imbalance in the same intensity as is typically the case in consumer transactions. Imbalances between shareholders are balanced on the level of company law, such as equal treatment or information requirements (*see, e.g.*, § 52 (3), § 66 (1), § 72 (3), § 22 (2) and (3) of the LLC Act)[20]).

Persons establishing a LLC are, per se, not consumers and/or entrepreneurs[21]). The situation is not that an entrepreneur is party to a contract *vis-à-vis* a person who is not an entrepreneur, thereby resulting in a possible imbalance in economic experience and/or legal know-how. Rather, several persons are entering into a corporate relationship in order to achieve a common purpose[22]). The (future) shareholders, typically, are neither consumers nor entrepreneurs in the sense of the legal definition of § 1 (1) of the Consumer Protection Act. The contracting

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SCHES UND EUROPÄISCHES KONSUMENTENSCHUTZRECHT (2nd ed.), 29 *et seq.*: Stefan Langer *in* HEINZ KOSSESNIK-WEHRLE, HANS P. LEHOFER, GOTTFRIED MAYER & STEFAN LANGER § 1 KSchG annot. 1 *et seq.*, Heinrich Mayerhofer & Kristin Nemeth *in* ATTILA FENYVES, FERDINAND KERSCHNER & ANDREAS VONKILCH, ABGB – KLANG KOMMENTAR (3rd ed.), Konsumentenschutzgesetz § 1 KSchG, annot. 1 *et seq.* and annot. 32 *et seq.*

[17]) Andreas Reiner, *supra* note 7, 151 at 168.

[18]) Bernd Terlitzka & Martin Weber, *supra* note 14, 1 at 7.

[19]) Veit Öhlberger, *supra* note 14, 51 at 52 *et seq.*

[20]) Christian Nowotny *in* MANFRED STRAUBE, WIENER KOMMENTAR ZUM GMBH-GESETZ (2008); Christian Nowotny *in* SUSANNE KALSS, CHRISTIAN NOWOTNY & MARTIN SCHAUER, ÖSTERREICHISCHES GESELLSCHAFTSRECHT (2008), at annot. 4/282, 4/298 4/343 4/349, 4/519, HANS-GEORG KOPPENSTEINER & FRIEDRICH RÜFFLER, *supra* note 8, § 22, annot. 32; JOHANNES REICH-ROHRWIG, GMBH-RECHT (2nd ed.), annot. 2/737.

[21]) *See* Bernd Terlitzka & Martin Weber, *supra* note 14, 1 at 7.

parties meet in front of a (neutral) public notary who reads the articles of association to them so that all partners are in a position to understand what they sign.

Of course, cases in which such situation is abused, are possible, *e.g.* if the company has been created as a means to another purpose (which could in itself be reached without the creation of a company), and this other purpose has a typical entrepreneur/consumer component[23]). In these situations, consumer protection laws shall apply.

The case law of Austrian courts on shareholders being consumers does not refer to the interpretation of § 582 (2) of the ACCP[24]). The cases concern the taking of securities by creditors from shareholders for the benefit of the company, thus not the relationship among shareholders but an external relationship between shareholders and third parties[25]). However, also in this respect the case law tends to view the term "entrepreneur" not only according to the formal criterion of the business owner, but according to economic principles[26]).

III. Corporate Disputes with Res Iudicata Effect on all Shareholders

Corporate disputes in which an award has effect on all shareholders concern, in particular, disputes regarding the effectiveness *(Wirksamkeit)*, voidability *(Anfechtbarkeit)* or nullity *(Nichtigkeit)* of shareholders' resolutions as well as of resolutions of an advisory board, supervisory board or other company body *(Beschlussmängel)* or the dismissal of a manager pursuant to § 16 (2) of the LLC Act (disputes on shareholders' resolutions). The arbitrability of such disputes is to be distinguished from the question of how an arbitration agreement shall be drafted and which arbitration rules shall be agreed on in order to reach the res iudicata effect *(Rechtskraftwirkung)* necessary in corporate matters.

Resolutions of company bodies can only be valid or null and void for all parties concerned, *i.e.* for the company itself and all the shareholders[27]). Thus, § 42

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[22]) *See* Susanne Kalss, Anlegerinteressen (2001), 537.

[23]) *See* Bernd Terlitzka & Martin Weber, *supra* note 14, 1 at 7; Susanne Kalss, Anlegerinteressen (2001), 117, 537.

[24]) *See also* Andreas Reiner, *supra* note 7, 151 at 166.

[25]) OGH (Austrian Supreme Court), 24 August 1998, 8 Ob 90/98p = SZ 71/137 = RDW 1999, 148; Andreas Reiner, *supra* note 7, 151 at 166.

[26]) OGH (Austrian Supreme Court), 14 February 2007, 7 Ob 266/06b; 9 August 2006, 4 Ob 108/06w = GesRZ 2006, 318 (Daniela Huemer); 11 February 2002, 7 Ob 315/01a = JBl 2002, 526 (Marin Karollus); 24 August 1998, 8 Ob 90/98p = SZ 71/137. According to the case, law a minority shareholder is not an entrepreneur, if her/his shareholding is only a financial investment and therefore has no relevant influence on the management of the company. *See* Andreas Reiner, *supra* note 7, 151 at 166; Peter Bydlinski & Susanne Haas, *Besonderheiten bei Haftungsübernahme eines geschäftsführenden Alleingesellschafters für Schulden "seiner" GmbH?*, ÖBA 2003, 11 at 19.

[27]) *See* Hans-Georg Koppensteiner & Friedrich Rüffler, *supra* note 8, § 42 annot. 13

(6) of the LLC Act provides: "The judgement declaring the nullity shall have legal effect for and against all shareholders"; § 42 (5) of the LLC Act states: "Each shareholder may join the legal dispute as an intervening third party at its own expense." For arbitral proceedings regarding disputes over shareholders' resolutions *(Beschlussmängelstreitigkeiten)*, this creates the requirement that such an arbitral proceeding is only lawful, if all concerned parties, *i.e.* the company itself and the shareholders, are bound by one and the same arbitration agreement[28]). When a proper arbitration clause is included in the articles of association of the company, the binding of the company itself is "bridged by company law"[29]).

The requirements for the legitimacy of arbitral proceedings regarding disputes over shareholders' resolutions and for the necessary res iudicata effect on shareholders are, pursuant to the Austrian *Oberster Gerichtshof*[30]): (i) all other shareholders are informed of the proceedings immediately after introduction of a relevant arbitral proceeding, *i.e.* that not only the company is a respondent, (ii) all parties are involved in the constitution of the arbitral tribunal and (iii) all parties in the arbitral proceeding are guaranteed due process of law. Arbitral proceedings regarding disputes over shareholders' resolutions typically bear the same problems as multi-party-arbitral proceedings[31]), in particular with regard to the constitution of the arbitral tribunal.

Recently the German *Bundesgericht* confirmed that disputes over the validity of shareholders' resolutions in German LLCs are arbitrable and arbitration clauses in articles of association may bind shareholders to the decisions of arbitral tribunals[32]). Even though not directly applicable to Austrian LLCs, this judgement

cont.; Susanne Kalss & Georg Eckert, *Zivilprozessrechtliche und schiedsrechtliche Fragen um die Übertragung von GmbH-Anteilen*, RdW 2007/148, 133; Michael Enzinger *in* MANFRED STRAUBE, WIENER KOMMENTAR ZUM GMBH-GESETZ (2008), § 42 annot. 39; MICHAEL UMFAHRER, GMBH HANDBUCH FÜR DIE PRAXIS (4th ed.), annot. 498.

[28]) *See* Martin Auer, *Schiedsfähigkeit von Beschlussmängelstreitigkeiten in der GmbH, in* DIE PRIVATISIERUNG DES PRIVATRECHTS, JAHRBUCH JUNGER ZIVILRECHTSWISSENSCHAFTLER (2002), 127 at 131; Martin Auer, *Schiedsvereinbarungen bei der GmbH im Licht des SchiedsRÄG 2005, in* SUSANNE KALSS & FRIEDRICH RÜFFLER, SATZUNGSGESTALTUNG IN DER GMBH – MÖGLICHKEITEN UND GRENZEN (2005) 123 at 129 *et seq.*: Andreas Reiner, *supra* note 7, 151 at 154.

[29]) *See* Martin Auer *supra* note 28, 127 at 132 with reference to BGH (German Federal Court), 29 March 1996, BGHZ 132, 278 at 284 *(Schiedsfähigkeit I)*.

[30]) OGH (Austrian Supreme Court), 10 December 1998, 7 OB 221/98w; as outlined by Andreas Reiner, *supra* note 7, 151 at 155; *see* Hilmar Raeschke-Kessler, *Gesellschaftsrechtliche Schiedsverfahren und das Recht der EU*, SchiedsVZ 2003, 145 at 152.

[31]) *See e.g.* Art 15 Vienna Rules, Art 10 ICC Rules.

[32]) BGH (German Federal Court), 6 April 2009, II ZR 255/08 *(Schiedsfähigkeit II); see* Christian Borris, *Die "Ergänzenden Regeln für gesellschaftsrechtliche Streitigkeiten" der DIS ("Dis-ERGeS")*, SchiedsVZ 209, 299; Wulf Goette, *Neue Entscheidung des Bundesgerichtshofes: Beschlussmängelstreitigkeiten im GmbH-Recht sind schiedsfähig*, GWR 2009, 103; Ekkehard Nolting, *Schiedsfähigkeit von Beschlussmängelstreitigkeiten*, NotBZ 7/2009, 241; Mathias Habersack, Anmerkung zu BGH II ZR 255/08, JZ 15/16/2009, 797; Christian Duve & Moritz Keller, *Schiedsfähigkeit von GmbH-Beschlussmängelstreitigkeiten – Schiedsfähigkeit II*, NJW 2009, 1962; Lars Böttcher & Silvanne Helle, *Zur Schiedsfähigkeit von Beschlussmängelstreitig-*

has also importance for the arbitration of corporate disputes in Austria. The court proposed a certain level of protection that is comparable to court proceedings and established a number of criteria for the validity of arbitration clauses in articles of association. These criteria are, in general, in line with the requirements developed by the Austrian courts and legal practice[33]):

- The arbitration clause must be included in the articles of association with the consent of all shareholders[34]).
- Each shareholder must receive notice of the initiation and the course of the arbitration proceedings and must be allowed to participate in the proceedings, by intervening on either side within a certain period of time after filing of the request for arbitration[35]).
- All shareholders must have the opportunity to participate in the selection of the arbitrators, unless the selection is made by a neutral person or institution[36]). However, either group of claimants or respondents may select

keiten – Schiedsfähigkeit II, NZG 2009, 700; Reinmar Wolff, *Beschlussmängelstreitigkeiten im Schiedsverfahren*, NJW 2009, 2021; Rüdiger Werner, Schiedsfähigkeit von Beschlussmängelstreitigkeiten im Recht der GmbH, MDR 2009, 842; Simon Manner, *DIS-Musterklausel für gesellschaftsrechtliche Streitigkeiten wird mit Spannung erwartet*, Betriebs-Berater//BB 24.2009//8.6.2009, 1263; Herbert Geisler, *Voraussetzungen einer wirksamen Schiedsklausel in einer GmbH-Satzung ("Schiedsfähigkeit II")*, juris, 20.6.2009; Philipp Wagner, *BGH: Beschlussmängelstreitigkeiten im GmbH-Recht sind grundsätzlich schiedsfähig – "Schiedsfähigkeit II"*, GWR 2009, 110; *see* also BGH (German Federal Court), 29 March 1996, BGHZ 132, 278 *(Schiedsfähigkeit I)*.

[33]) Following Andreas Reiner (*supra* note 7, 151 at 156), such concentration of proceedings and guarantee of due process of law shall is also the goal in arbitration who recommends to include corresponding provisions in an arbitration agreement. The managers of a LLC shall be explicitly obligated (although such an obligation can be inferred from § 197 (5) Stock Corporation Act) to inform shareholders of any arbitral proceedings and the subject thereof. To avoid a "race" between arbitral tribunals, a right to join the proceedings within a certain period of time from pendency of arbitration shall be provided for, as well as a prohibition to institute other proceedings regarding the same subject matter. One should hold off on the constitution of the arbitral tribunal until the end of this time period. In the case that the parties of the claimant or respondent side can not agree on an arbitrator, the rule that a neutral third party shall appoint all arbitrators shall take precedence; *see* Christian Borris, *Abfassung von Schiedsklauseln und Ausgestaltung des Schiedsverfahrens in Streitigkeiten aus gesellschaftsrechtlichen Vertragsverhältnissen*, IN KARL-HEINZ BÖCKSTIEGEL, KLAUS PETER BERGER & JENS BREDOW, DIE BETEILIGUNG DRITTER AN SCHIEDSVERFAHREN (2005) 109 at 120 *et seq.*

[34]) Or, alternatively, must be established outside of the articles of association by agreement between all shareholders and the company.

[35]) Martin Auer, *supra* note 28, 123 at 130, recommends combining the notification of the pendency of arbitral proceedings with the order in the articles of association to state within a certain period of time whether or not one is joining the arbitral proceedings, and if so, on which side. If the time period ends without anyone coming forward, the arbitrators may be appointed without the participation of persons subjectively affected by the arbitral judgment.

[36]) Also under current Austrian practice it is not sufficient in arbitral proceedings regarding disputes over shareholders' resolutions to allow those shareholders who are not already party to the proceedings as claimant, to take part in the proceedings as an intervener.

an arbitrator by a simple majority decision if several claimants or respondents are involved[37]).

- The arbitration clause must ensure that all disputes on the validity of shareholders' resolutions regarding identical factual and legal issues pertaining to the validity of a shareholders' resolution will be decided by the same arbitral tribunal[38]).

The court suggested two ways to ensure that one arbitral tribunal decides all related disputes: (i) the articles of association name the arbitrators or a neutral body to select the arbitrators; or (ii) the articles of association contain a clause preventing another claimant from petitioning a different arbitral tribunal if the articles of association do not name or provide for the neutral selection of the arbitrators. If the articles do not name the arbitrators, the arbitration clause must provide for a special procedure for their selection. The request for arbitration must be submitted to the company without the selection of arbitrators. The company must subsequently forward the request for arbitration to all shareholders to side with either the claimant or the company within a certain timeframe. The wording of the arbitration clause must guarantee that, under all circumstances, all shareholders have an opportunity to participate.

There is, however, a major difference between the approaches of the Austrian and the German highest courts. The German *Bundesgerichtshof* requires that the arbitration clause provides for (detailed) procedural rules that ensure legal protection similar to state courts. Pursuant to the case law of the Austrian *Oberster Gerichtshof* it is sufficient that the arbitration proceedings are conducted in line with the outlined requirements. Any deviation from these requirements could be challenged on the grounds of lack of due process.

Rather, the other shareholders shall already be involved in the constitution of the arbitral tribunal so as to safeguard their rights and interests; *see* Andreas Reiner, *supra* note 7, 154 *et seq.*

[37]) The selection of an arbitrator by majority decision requires relevant language in the arbitration clause. Pursuant to § 587 (5) of the ACCP, when several parties are involved, as claimant or as respondent, and three arbitrators is agreed upon, the multiple claimants, jointly, and the multiple respondents, jointly, shall appoint a co-arbitrator. If the claimants are unable to agree upon such appointment, and the parties have not agreed upon anything else, the arbitrator is to be appointed by the court. This is also the case for several respondents, *i.e.* for the company and those shareholders that are entering into the arbitral proceedings on the side of the respondent company as party to the arbitral proceedings.

[38]) The concentration of proceedings and the protection of due process of law are closely connected to the res iudicata effect of court proceedings; *see* BGH (German Federal Court), 29 March 1996, 132, 278 at 286 *(Schiedsfähigkeit I)*. § 197 (3) of the Austrian Stock Corporation Act, which is *mutatis mutandis* applied to LLCs, provides for an obligatory combining of proceedings of several actions of voidance *(Anfechtungsklagen)* against one and the same shareholders' resolution. Further, the managing board is obligated to publish the filing of the voidance action and the date of the preliminary hearing in the appropriate announcement bulletins pursuant to § 197 (5) of the Stock Corporation Act. Such publication shall assure that the shareholders affected by a judgment are able join the proceedings as intervener; *see* Christoph Diregger *in* PETER DORALT, CHRISTIAN NOWOTNY & SUSANNE KALSS, AKTG, § 197 annot. 51 *et seq.*: *see* also Andreas Reiner, *supra* note 7, 151 at 156, note 45.

It is not relevant whether or not all those concerned on whom the arbitral award has or should have a res iudicata effect have actually taken part in the arbitral proceedings, and were therefore party to the proceedings. The important thing is that they had the possibility to do so. This is also no different in state court proceedings. A shareholder who does not take part in the constitution of the arbitral tribunal may participate in the arbitral proceedings at a later point and join as party to the proceedings. However, the shareholder must then accept that the arbitral tribunal has been constituted in the meantime without his participation[39]).

IV. Corporate Disputes with Non-Shareholders Having an Interest in the Result of the Proceedings

Judgements and awards reversing shareholders' resolutions have constitutive effect *(Gestaltungswirkung)*[40]). This raises the question of the effect of an award *vis-à-vis* third persons who are not shareholders but have a legal or other interest in the result of the proceedings[41]). Examples are a contractor of the company where the shareholders by resolution by resolution fix the terms of an agreement to be concluded between the contractor and the company, or the manager with regard to a resolution on distribution of profits which has an effect on the bonus of the manager, or the acquirer of a company-share from a shareholder with regard to a resolution on transfer restrictions contained in the articles of association.

Unlike litigation in state courts where third parties may usually be joined to proceedings, the jurisdiction of an arbitral tribunal to allow for the intervention of third parties to an arbitration procedure is limited. As between the original parties to an arbitration agreement, such consent may be either express, implied or by reference to a particular set of arbitration rules agreed to by the parties which provide for intervention.

Recently, *Christian Nowotny* denied the arbitrability of disputes over shareholders' resolutions which have an effect on third persons. He argued[42]) that such disputes were only arbitrable, if the third person willingly had submitted to the arbitral clause and the arbitral proceedings had only started with the involvement of

[39]) For a detailed discussion of the new Supplementary Rules for Corporate Law Disputes promulgated by the German Institution of Arbitration *see* Christian Borris, *supra* note 32, 299.

[40]) Hans-Georg Koppensteiner & Friedrich Rüffler, *supra* note 8, § 41 annot. 23; Michael Enzinger *in* Manfred Straube, Wiener Kommentar zum GmbH-Gesetz (2008), § 41 annot. 28 and § 42 annot. 4; Michael Umfahrer, *supra* note 27, annot. 490.

[41]) For a discussion of the effects of judgments on third persons in view of Article 6 of the European Convention on Human Rights *see* Gottfried Musger, *Verfahrensrechtliche Bindungswirkungen und Art 6 MRK – Überlegungen aus Anlass von OGH 17. 1. 1990, 1 Ob 694/89 = JBl 1990, 662,* JBl 1991, 420 and 499.

[42]) Christian Nowotny, *Gesellschaftsrechtliche Streitigkeiten und Schiedsgericht,* WBl 2008, 470 at 472 *et seq.*

the concerned third person. Otherwise the arbitral award would not lead to a final decision on the legal dispute. The external effect *(Außenwirkung)* of an arbitral award could only be accepted, if the third person had the possibility to intervene. If this possibility was not offered at the start of the proceedings, the award would not have binding effect. Such disputes, moreover, would not be covered by an arbitration clause in articles of association, even if the clause regulated disputes on shareholders' resolutions. With respect to the effect of transfer restrictions, state jurisdiction could not simply be put on par with the award of an arbitral tribunal.

This position is reaching too far. Shareholders' resolutions, after all, are decisions among the shareholders, for the shareholders and the company. Shareholders decide freely without being bound *vis-à-vis* non-shareholders. In fact, commitments *vis-à-vis* non-shareholders in articles of association and far-reaching commitment outside corporate documents would violate corporate law principles[43]). Third persons have to take the validity or the annulment of shareholders' resolutions as they arise under corporate rules[44]). The same applies to disputes among the shareholders on their resolutions. These are matters to be solved among the shareholders, in general, without other parties to intervene.

The situation is only different when the articles of association link the shareholders' resolution with the legal position of a non-shareholder. For example, the articles of association could provide for consent by shareholders' resolution for an effective transfer of shares from one shareholder to a new shareholder. From a corporate perspective, also in such cases, the shareholders are free to decide on the matter in accordance with the articles of association. The situation changes, if and when the resolution is passed[45]). From this point on, the resolution is in existence. The third person, in case of a positive decision, has acquired the share, in case of a negative decision, has not acquired the share. The third person, in both cases, has a legal interest in the resolution founded in the corporate documents.

In view of third persons, therefore, (i) resolutions with a legal effect on non-shareholders founded in the corporate documents and (ii) resolutions with other effects on non-shareholders based on other relationships have to be distinguished[46]). Such other relationships include employment agreements, agreements between the company and third persons on the management level, or relationships that purely have an economic background.

Persons, on whom a shareholders' resolution has a legal effect which is not founded in the corporate documents, have to take the validity or the annulment of

[43]) *See* Hans-Georg Koppensteiner & Friedrich Rüffler, *supra* note 8, § 39 annot. 18 *et seq.*

[44]) Rudolf Strasser, *supra* note 9, § 198 annot. 5; *see* also Christoph Diregger *in* Peter Doralt, Christian Nowotny & Susanne Kalss, Kommentar AktG § 198 annot. 13.; Uwe Hüffer *in* Münchner KommAktG (2nd ed.) § 248 annot. 7 *et seq.*, 13 and 18 *et seq.*: Karsten Schmidt *in* GKommAktG (4th ed.) § 248 annot. 4 *et seq.*

[45]) *See* also Wilfried Thöni, *supra* note 9, 298 at 301.

[46]) Wilfried Thöni, *supra* note 9, 298 at 301, distinguishes resolutions that may not be reversed by a new resolution at a later stage (resolutions with external effect) and resolutions that may be reversed by a new resolution at a later stage (resolutions with internal effect).

such shareholders' resolution as they arise under corporate rules. Thus, the contractor with respect to whom the shareholders approved certain contractual conditions, the shareholders' resolution has a binding effect on him, even though he may not be in the position to conclude the service agreement. The contractor has not a legal position founded in the corporate documents. The same applies to the manager whose bonus is agreed in an employment agreement; the result would be different, if bonuses were provided for in the corporate documents.

§§ 577 *et seq.* of the ACCP do not explicitly regulate third party intervention in arbitration proceedings. In general, third-party notice is a lawful procedural instrument in arbitration. The Austrian *Oberste Gerichtshof*, however, denied the binding effect of the award unless the receiver of the third party notice was also a party to the arbitration agreement or had submitted to arbitration[47]). Pursuant to § 594 (1) of the ACCP, the parties are free to determine the rules of procedure, so long as they are not in conflict with mandatory law. To effectively protect an arbitral award, it is up to the parties to contractually provide for the possibility of third party intervention, and to involve those persons whose interests may be affected by the arbitral award in the arbitral proceedings through third party notice. The arbitration clause could authorize the arbitral tribunal to decide whether a third person should be joined in the arbitration with similar rights as the intervention pursuant to §§ 17–20 of the ACCP *(einfache Nebenintervention)*.[48]) The problem, generally, is under consideration as part of the proposed revision of the UNCITRAL Rules.[49])

To conclude, in the case of resolutions with a legal effect on non-shareholders founded in corporate documents, an award rendered by arbitral tribunal has binding effect on this person only if this person had submitted to the arbitration agreement. Shareholders are advised to ensure that agreements on the transfer of company-shares contain an arbitration clause linking to the arbitration clause contained in the articles of association of the company.

[47]) OGH (Austrian Supreme Court), 1 October 2008, docket no. 6 Ob 170/08f (Austria) annot. 2.3; Christian Hausmaninger, *supra* note 6, § 595 annot. 144; *see* Jürgen Brandstätter, *The binding nature and fact determining effect of an arbitral award*, IBA Arbitration News 2009/14, 14.

[48]) Under Austrian law, if proceedings are already pending and if a person has a legal interest in the case that one party wins the case, the person may enter the proceedings as intervener *(einfacher Nebenintervenient)* on the side of this party (§§ 17–20 of the ACCP). If neither the LLC Act nor other statutes extend the effect of a judgment/award to the third person, the intervener (only) has an assisting function *(Streithelfer)* and cannot make dispositions with respect to the matter in dispute.

[49]) *See* Markus Wirth, Current revision of UNCITRAL Rules, p 10 (http://www.homburger.ch/fileadmin/publications/UONO26O_01.pdf).

V. The Entry of New Shareholders in an LLC

Articles of association *("Statut")* are an agreement among the shareholders of a legal entity, *i.e.* the legal act which (i) creates the legal entity, (ii) regulates the relationships between the legal entity and its shareholders and (iii) the relationships among the shareholders of the legal entity, by supplementing to or deviating from the non-mandatory norms of the LLC Act[50]). Characteristic for LLCs is that they are created for a long period of time. In view of dispute resolution it is relevant that two or more shareholders are involved and a change in shareholders often occurs[51]). An arbitration clause as part of the articles of association shall be effective for the duration of validity of such articles of association, *i.e. vis-à-vis* all shareholders including new shareholders.

The arbitration provisions of the ACCP, pursuant to its § 581 (2), shall "analogously apply by to arbitral tribunals that, in a legally valid manner, are ordered ... by articles of association". Concerning arbitration in LLCs, this means that the formal requirements to be observed with regard to the articles of association in general, must also be adhered to with regard to the arbitration clause[52]). The articles of association of a LLC, including the arbitration clause, require a notarial deed, *i.e.* a stricter form than required by § 581 (1) ACCP for arbitration agreements. Incidentally, these articles of association are available to the public, namely in the companies' register.

The arbitration clause in articles of association does not only apply to the founding shareholder, but rather to all current and future shareholders, without any act of will on the part of a new shareholder or even an agreement of the old shareholder being necessary. It is generally recognized that legal successors, including singular successors, are bound to arbitration agreements signed by their legal predecessors[53]). This applies to takeovers of a company and new shareholders who originally *(originär)* acquire shares of a LLC by way of a capital increase. New shareholders are bound to an arbitration clause in articles of association, without having to adhere to any formal requirements regarding the arbitration when they join the company, as § 581 (2) of the ACCP uses the term "arbitral tribunals that are *ordered ("angeordnet")* by articles of association" and not "arbitration agreement" or "arbitration clause"[54]). The application of the general rules on

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[50]) Andreas Reiner, *supra* note 7, 151 at 159 *et seq.*

[51]) Andreas Reiner, *supra* note 7, 151 at 159 *et seq.*

[52]) Andreas Reiner, *supra* note 7, 151 at 161.

[53]) *See, e.g.*, Christian Hausmaninger, *supra* note 6, § 581 annot. 206 *et seq.:* GEROLD ZEILER, *supra* note 6, § 581 annot. 106 *et seq.:* jurisdiction: OGH (Austrian Supreme Court), docket no. 8 Ob 179/00g, *in* JBl 2001, 732 (Austria); OGH (Austrian Supreme Court), docket no. 2 Ob 53/04i, *in* ecolex 2004 (2) 75 = RdW 2004/495 (Austria); to the obligation of the successor within splitting a company *see* OLG Wien (Circuit Court Vienna), 5 July 5 2006, docket no. 4 R 108/06s; OGH (Austrian Supreme Court), 18 March 2004, docket no. 2 Ob 53/04i (Austria).

[54]) Andreas Reiner, *supra* note 7, 151 at 160; Peter Rummel, *Privates Vereinsrecht im Konflikt zwischen Autonomie und rechtlicher Kontrolle, in* LIBER AMICORUM RUDOLF STRASSER

the conclusion of arbitration agreements would be highly inappropriate[55]). In cases where new shareholders do not fulfill the formal requirements for the conclusion of a bilaterally agreed arbitration agreement, the original arbitration clause would be invalid due to the necessary binding effect *vis-à-vis* all shareholders. To avoid adverse effects, such as retroactively reversing the share purchase, it is sufficient that, as expressed in the wording of § 581 (2) of the ACCP, the original arbitration clause is valid.

VI. The Inclusion of a New Arbitration Clause in Existing Articles of Association

Undisputed is that arbitration clauses may be newly incorporated in existing articles of association[56]). Controversial are the voting requirements on such inclusion, *i.e.* whether a resolution requires a unanimous vote or a qualified majority is sufficient. There is no case law on this matter[57]).

It is evident that an arbitration clause adopted through unanimous resolution of all shareholders can be included in the articles of association. If, however, the articles of association do not state any requirements for ex post adoption, the question is whether a majority resolution is sufficient[58]). All boils down to the issue whether it is a "legally valid manner" (§ 581 (2) of the ACCP), to include an arbitration clause in existing articles of association through a majority resolution.

There are no specific provisions in the LLC Act on this question that states that an arbitration clause may be adopted in the articles of association ex post through majority resolution[59]). § 581 (2) of the ACCP assumes that arbitration clauses are included upon the initial adoption of the articles of association, which obviously requires the agreement of all those involved in the drafting of the articles of association.

The arguments put forward in favor of unanimous decision include: A dispute resolution by state courts has to be regarded similar to a special right for indi-

(1983) 813 at 830; RUDOLF STRASSER, com to decision OGH (Austrian Supreme Court), docket no. 3 Ob 543/94, *in* JBl 1995, 596 (Austria); GEROLD ZEILER, *supra* note 6, § 581 annot. 135; *see* for Germany Reinhold Geimer *in* RICHARD ZÖLLER, ZIVILPROZESSORDNUNG (ZPO) (25th ed.), § 1066 annot. 1 *et seq.:* Joachim Münch *in* MÜNCHKOMM ZPO (2nd ed.), § 1066 annot. 4; Peter Schlosser *in* FRIEDRICH STEIN & MARTIN JONAS, KOMMENTAR ZUR ZIVILPROZESSORDNUNG (ZPO) (22nd ed.), § 1066 annot. 10; con. HEINZ SCHWAB & GERHARD WALTER, SCHIEDSGERICHTSBARKEIT (7th ed.), Chp 32 annot. 5; GERHARD WAGNER, PROZESSVERTRÄGE (1998), 495.

[55]) Andreas Reiner, *supra* note 7, 151 at 160.

[56]) Andreas Reiner, *supra* note 7, 151 at 161.

[57]) Andreas Reiner, *supra* note 7, 151 at 162.

[58]) The ECJ regards a majority decision to amend the articles of association to include a jurisdiction clause admissible (ECJ C-214/89, *Powell Duffryn,* ECR 1992, I-1745 (1775), EuZW 1992, 252); *see* Peter Mülbert, *Gerichtsstandsklauseln als materielle Satzungsbestandteile,* ZZP 118 (2005) 313 (353).

[59]) The same result Andreas Reiner, *supra* note 7, 151 at 163.

vidual shareholders pursuant to § 50 (4) of the LLC Act[60]). A waiver of access to the state courts implies a waiver of the legally competent judge *(Verzicht auf den gesetzlichen Richter)*[61]). The core area of the shareholder rights is concerned[62]). Recently the German *Bundesgerichtshof* confirmed that a unanimous consent of the shareholders to the arbitration clause in necessary, if disputes on the validity of shareholders' resolutions shall be arbitrable[63]).

The arguments put forward in favor of majority decision include: By becoming a shareholder in a LLC, one generally agrees to abide by majority decisions. A resolution adopted with the majority required by law (or sufficient by law) to amend the articles of association, is also sufficient for the inclusion of an arbitration clause in the articles of association[64]). Some infer the legitimacy of the adoption of an arbitration clause through majority resolution from parallels between inheritance law and company law[65]). Positions in favor of a majority resolution were supported by arguments such as, the outvoted shareholders has a right to oppose the resolution[66]); the membership in the company is voluntary[67]), and shareholders can freely transfer their shares and thus leave the company, if they are not satisfied with the resolution[68]).

In the opinion of the authors, under the current legal situation, it is both consistent and necessary to consider majority resolutions insufficient for the new adoption of an arbitration clause in articles of association. It, of course, works both ways. Thus, a shareholder of a company which has assets or shareholders of which are residents or have assets in a state outside the Brussels Regime may be trapped with jurisdiction in state courts.

To include a new arbitration clause, a unanimous decision under corporate law is required, unless the articles of association provide for specific voting majorities[69]). A unanimous shareholders' resolution of the shareholders present

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[60]) *See* Wilfried Thöni, *supra* note 9, 298 at 300.

[61]) BGH (German Federal Court), 1993, BGHZ 144, 146; Peter Schlosser *in* FRIEDRICH STEIN & MARTIN JONAS, KOMMENTAR ZUR ZIVILPROZESSORDNUNG (ZPO) (22nd ed.), § 1066 annot. 12; Jochen Reichert & Stephan Harbarth, *Statutarische Schiedsklauseln – Einführung, Aufhebung und umwandlungsrechtliche Behandlung,* NZG 2003, 379 at 380.

[62]) Karsten Schmidt, *Schiedsklauseln und Schiedsverfahren im Gesellschaftsrecht als prozessuale Legitimationsprobleme – Ein Beitrag zur Verzahnung von Gesellschafts- und Prozessrecht,* BB 2001, 1857 at 1861; Jochen Reichert & Stephan Harbarth, *supra* note 52, 379 at 380.

[63]) BGH (German Federal Court), 6 April 2009, II ZR 255/08 *(Schiedsfähigkeit II)* annot. 15; *see supra* note 32.

[64]) Karl Hempel, *Zur Schiedsfähigkeit von Rechtsstreitigkeiten über Beschlussmängel in der GmbH, in* LIBER AMICORUM HEINZ KREJCI, 1769 at 1780 *et seq.;* Hilmar Raeschke-Kessler, *supra* note 30, 145 at 154.

[65]) Ulrich Haas, *Beruhen Schiedsabreden in Gesellschaftsverträgen nicht auf Vereinbarungen i.S. des § 1066 ZPO oder vielleicht doch?,* SchiedsVZ 2007, 1 at 7 *et seq.*

[66]) Karl Hempel *supra* note 64, 1769 at 1781.

[67]) Ulrich Haas *supra* note 65, 1 at 6 *et seq.*

[68]) Ulrich Haas *supra* note 65, 1 at 5.

[69]) Under Italian law, comparatively, amendments to the articles of association generally require a majority vote. The ex post adoption or deletion of an arbitration clause in arti-

in a shareholders meeting in line with the legal requirements for a quorum is sufficient[70]). Each present shareholder can prevent the adoption of an arbitration clause by opposing the resolution or abstaining from voting. Shareholders who do not take part in the shareholders' meeting (despite correct convocation) cannot prevent the adoption of an arbitration clause. The publication of the agenda of the shareholders' meeting protects shareholders from any surprises. Since an amendment to the articles of association is involved, the relevant formal requirements of LLCs must be adhered to (§ 49 Abs 1 GmbHG)[71]).

VII. The Deletion of an Arbitration Clause in Articles of Association

The balance of interests, in general, is not different, when the *ex post* deletion of an arbitration clause in articles of association is concerned.

Andreas Reiner[72]) argues that the general majority required for amendments to the articles of association is sufficient for the deletion of arbitration clauses, as access to state courts is fully restored through a deletion. In cases in which shareholders have legitimate interests in arbitration, an arbitration clause in the articles of association is to be qualified as a special right pursuant to § 50 (4) of the LLC Act of those shareholders who rely on arbitral tribunals. Consequently the ex post deletion of an arbitral clause in such cases would require the agreement of the concerned shareholder in addition to that of the required majority.

The argument is based on the full restoration of access to state courts through the deletion of an arbitration clause, therefore, assumes that the dispute resolution by state courts and by arbitral tribunals are not equivalent. One can argue that, except for ICSID arbitration, any decision rendered by an arbitral tribunal, *e.g.* as to its jurisdiction, is subject to control by state courts and that arbitral tribunals ultimately depend on state courts. Thus, the two dispute resolution systems would not be equivalent on a procedural level. On the level of dispute resolution, i.e. in substance, however, arbitration is equivalent to state court proceedings.[73]) Such differences on the procedural level are not sufficient to allow differ-

cles of association requires a two-thirds majority. Dissenting or absent shareholders have a right to withdraw from the company. *See* Art 34 of the Decreto Legislativo No. 5 of 17 January 2003 *(Definizione dei procedimenti in materia di diritto societario e di intermediazione finanziaria, nonché in materia bancaria e creditizia, in attuazione dell'articolo 12 della L. 3 ottobre 2001, annot. 366): see* Cecilia Carrara, *Die italienische Reform der Schiedsgerichtsbarkeit bei gesellschaftsrechtlichen Streitigkeiten,* SchiedsVZ 2003, 253 at 255; Peter Klein, *Arbitrability of Company Law Disputes, in* AUSTRIAN ARBITRATION YEARBOOK 2007, 29 at 50.

[70]) 10% of the share capital represents the minimum quorum at the shareholders meeting pursuant to § 38 (6) of the LLC Act.

[71]) MICHAEL UMFAHRER, *supra* note 27, annot. 453 and annot. 522 *et seq.*: HANS-GEORG KOPPENSTEINER & FRIEDRICH RÜFFLER, *supra* note 8, § 49 annot. 11 *et seq.*

[72]) Andreas Reiner, *supra* note 7, 151 at 163.

[73]) *See, e.g.,* ACHIM AHRENDT, DER ZUSTÄNDIGKEITSSTREIT IM SCHIEDSVERFAHREN (1996) 15.

ent majorities for the deletion and for the inclusion of an arbitration clause. A deletion of an arbitration clause in articles of association, as an inclusion of it, has the effect of loss of the kind of legal protection which the parties considered adequate for the company concerned. Parties having included an arbitration clause in articles of association may have decided for (or against) arbitration on several legitimate grounds. Thus, similar to the inclusion of a new arbitration clause in existing articles of association, unanimous decision is required to delete an existing arbitration clause from the articles of association.

VIII. The Adjustment of an Arbitration Clause in Articles of Association

The balance of interests is different, when the amendment or adjustment of an existing arbitration clause in articles of association is involved. Case law left it open[74]), under which requirements an arbitration clause in articles of association may be amended ex post and whether a majority vote of the shareholders is sufficient for the validity of the amendment.

Adjustment situations typically come along with the rescue of an arbitration clause which is invalid due to a reference to a no longer existing arbitral institution, by referencing another existing arbitral institution. Other cases may be the amendment of ad-hoc arbitration clauses which did not cover multi-party-arbitration and binding force on all shareholders[75]). In such cases, typically, there was a unanimous decision in favor of arbitration and the arbitration clause has to be amended or adjusted to keep its effectiveness[76]).

The amendment or adjustment of an existing arbitration clause in articles of association requires (only) a majority decision[77]). Further, a majority shareholder has fiduciary duties *vis-à-vis* the company and *vis-à-vis* other shareholders pursuant to § 61 of the LLC Act[78]). The deprivation of effective legal enforcement by a majority shareholder may be deemed as violation of fiduciary duties. If a certain voting conduct violates fiduciary duties, the shareholder must abstain from voting or vote as required by the fiduciary duties[79]).

Arbitral rules of institutional arbitral tribunals are more or less improved and enhanced in regular intervals. Modern arbitral rules even provide that the ar-

[74]) OGH (Austrian Supreme Court), 17 June 2003, docket no. 5 Ob 112/03m, RdW 2003/563 (Austria); *see* Andreas Reiner, *supra* note 7, 151 at 164.

[75]) Hilmar Raeschke-Kessler, *supra* note 64, SchiedsVZ 2003, 145 at 153.

[76]) *E.g.* in view of BGH (German Federal Court), 6 April 2009, II ZR 255/08 *(Schiedsfähigkeit II)* annot. 15; *see supra* note 32.

[77]) *Also* Andreas Reiner, *supra* note 7, 151 at 164.

[78]) Hans-Georg Koppensteiner *in* Liber amicorum Mayer-Maly (1996), 326 *et seq.:* Hans-Georg Koppensteiner & Friedrich Rüffler, *supra* note 8, § 61 annot. 10 *et seq.:* Max Gellis & Erich Feil, GmbH-Gesetz (7th ed.), § 61 annot. 10.

[79]) Hans-Georg Koppensteiner & Friedrich Rüffler, *supra* note 8, § 61 annot. 8 cont.

bitral rules current at the point of time where the arbitral proceedings begin should apply. Ad-hoc arbitration agreements may therefore require greater adjustments, especially in light of the fact of the long-term character of company relationships[80]).

[80]) Andreas Reiner, *supra* note 7, 151 at 164.