

RECHTSANWÄLTE
ATTORNEYS AT LAW



AUSTRIA (DISPUTES)

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Klaus Oblin specialises in commercial and civil law-related disputes. He also acts as counsel and arbitrator in arbitrations under the rules of bodies such as the International Chamber of Commerce (ICC), the International Arbitral Centre of the Austrian Federal Economic Chamber (VIAC), Swiss Rules and UNCITRAL.

He regularly provides advice with regard to various matters of commercial, contract and construction law and the establishment of businesses. Klaus established Oblin Attorneys at Law in 2004 and before that he worked for Freshfields Bruckhaus Deringer and Vienna McDougal Love Eckis Smith & Boehmer.

He is a member of the International Chamber of Commerce (ICC), International Centre for Dispute Resolution (ICDR) Austrian Arbitration Association (ArbAut), German Institution of Arbitration (DIS) and the International Bar Association (IBA).

Oblin's core focus is the management and resolution of commercial disputes. The firm represents its clients in all phases of domestic and international litigation and arbitration proceedings, from the initiation of the proceedings to the enforcement of court judgments and arbitral awards.

They also advise clients in general business law matters including commercial and corporate law as well as real estate and construction law.

TOP TIPS FOR

Successful negotiations

Separate the people from the problem

Don't attack people personally for using a tactic you consider illegitimate. If they get defensive it may be more difficult for them to give up the tactic, and they may be left with a residue of anger that will fester and interfere with other issues. Question the tactic, not their personal integrity. It will be easier to reform the negotiating process than to reform those with whom you are dealing. Don't be diverted from the negotiation by the urge to teach them a lesson.

Focus on interests, not positions

Why are you committing yourself in the press to an extreme position? Are you trying to protect yourself from criticism? Or are you protecting yourself from changing your position?

Invent options for mutual gain

Suggest alternative games to play. For example, you might commit that both parties undertake to make no statements to the press until they reach agreement or break off the talks.

Insist on using objective criteria

Above all, be hard on principle. If, for example, you are being made to sit in the low chair with your back to an open door, then make sure you try out the principle of reciprocity on them. "I assume that you will sit in this chair tomorrow morning?"

I QUESTION ONE

What is your best practice approach when advising General Counsel, to ensure dispute resolution clauses are to their real advantage and do not obstruct enforcement proceedings?

There are a number of formal requirements for an arbitration agreement:

An arbitration agreement must sufficiently specify the parties (they must at least be determinable), it must also sufficiently specify the subject matter of the dispute in relation to a defined legal relationship (this must at least be determinable and it can be limited to certain disputes, or include all disputes).

The agreement must sufficiently specify the parties' intent to have the dispute decided by arbitration, thereby excluding the state courts' competence; and be contained either in a written document signed by the parties, or in telefaxes, e-mails or other communications exchanged between the parties, which preserve evidence of a contract.

A clear reference to general terms and conditions containing an arbitration clause is sufficient.

In certain circumstances an arbitration agreement is no longer enforceable. These include arbitration agreements and clauses that can be challenged under the general principles of Austrian contract law, in particular on the grounds of error, deceit or duress, or legal incapacity. There is controversy over whether such a challenge should be brought before the arbitral tribunal, or before a court of law. If the parties to a contract containing an arbitration clause rescind their contract, the arbitration clause is deemed to be no longer enforceable, unless the parties have expressly agreed on the continuation of the arbitration clause. In the event of insolvency or death, the receiver or legal successor is, in general, bound by the arbitration agreement. An arbitral agreement is no longer enforceable if an arbitral tribunal has rendered an award on the merits of the case, or if a court of law has rendered a final judgment on the merits and the decision covers all matters for which arbitration has been agreed on.

I QUESTION TWO

Are there any particular rules around funding litigation in your jurisdiction that General Counsel should be aware of?

There are no specific provisions in Austrian legislation, however, professional conduct regulations do not allow for lawyers to be paid on the basis of contingency fees only; thus any funding agreement that directly or indirectly results in such a model is not available to legal practitioners.

On the other hand, the Austrian Supreme Court approved litigation funding by a third-party in a 2013 decision (OGH, 6 Ob 224/12b). In addition, in 2004 and 2012, the Vienna Commercial Court denied the defendants' objections to third-party funding of the respective claims.

Thus, today, litigation funding in Austria is accepted and has been judicially endorsed by Austrian court practice. Although the courts did not comprehensively cover all aspects involved, they established in Austria an unquestioned and favorable environment for third-party litigation funding.

I QUESTION THREE

What techniques are typically used by international counterparties in your experience when attempting to gain the initiative during a dispute? How important are civil procedural rules?

Sometimes, even the best preparation cannot prevent determined counsel from using measures that are inappropriate, offensive, unethical and may result in the proceedings being derailed.

In order to tackle any such attempts, a step-by-step approach is advisable:

- request interim (procedural) measures (preserving documents, delivery of the requested documents, security for costs)
- suggest negative or adverse inferences (e.g. negative assessment of the behavior at the evidence stage)
- ask for to penalisation by cost sanctions, reporting unethical behaviour to arbitral institutions or bar associations, ex-parte awards and exclusion of abusive counsel.



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