Pitfalls of Competence

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I. Introduction

Before entering into arbitration proceedings, it is regularly necessary for legal counsel to evaluate the validity of the arbitration agreement as such.[1]) As the arbitral tribunal's competence is intrinsically tied to the validity of the arbitration agreement, any defects (whether of formal or substantive nature) of the arbitration agreement directly impair or even abrogate the arbitral tribunal's competence. If the validity of an arbitration agreement is dubious, claimant faces a difficult decision. Should he run the risk and ignore all doubts and still try to submit the matter to arbitration? On the other hand, if he gives in to these doubts and brings the claim before the ordinary court, respondent may well argue that there is an arbitration agreement after all. There is no way out, because claimant can neither foresee the strategy of respondent nor the final outcome of the decision on competence. Bringing a lawsuit before an incompetent arbitral tribunal instead of a competent court or vice versa may lead to the claim being rejected or the decision of the incompetent court or arbitral tribunal being set aside. Such consequences are of utmost gravity for the claimant. Not only are the proceedings leading up to this decision frustrated (and therefore implying the wastage of the costs of these proceedings, including any and all advances on costs that are regularly paid upfront in order to get the proceedings started), but because of the length of the proceedings before the incompetent arbitral tribunal or court, the underlying claim may, in the meantime, become time-barred and therefore cannot be raised a second time before the competent body.

It is obvious that the issue of competence is very important for arbitral proceedings and the way a country deals with this issue is decisive for its attractiveness as venue for arbitration. It is therefore important for parties to know at a very early

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[1]) As the arbitral tribunal's competence is subject to the arbitration agreement, the tribunal may only validly decide on those disputes that the parties have agreed that it should determine, see *Redfern/Hunter,* Law and Practice of International Commercial Arbitration (2004) 5–30.

stage how to proceed if there is ambiguity concerning the existence or validity of an arbitration agreement and the competence of the arbitral tribunal.

Even before entering into an agreement that contains an arbitration clause and fixes the place of arbitration, this question should be considered under the applicable law. The procedural aspects of the issue of competence will be governed by the law of the seat, because the seat of the arbitral tribunal (typically) determines the applicable procedural law.[2]) Such seat of the tribunal, often referred to as "place of arbitration" in the legal sense, is not to be confused with the factual venue where oral hearings may take place, which is often, but not necessarily identical.[3]) The validity and scope of the arbitration agreement will, on the other hand, have to be considered under the law governing the arbitration agreement.

It is crucial to know whether a party may, in case of doubt regarding the existence or validity of the arbitration clause or arbitration agreement, start parallel proceedings before the arbitral tribunal and an ordinary court, especially if such step is necessary because the claim is threatened by prescription. The law governing the arbitration proceedings should ideally avoid such risk for claimant and also clearly provide how courts or arbitral tribunals should proceed in case of such ambiguity. To be in the interest of claimant the applicable law should also prevent the possible consequence of a claim becoming time barred because the competence of an arbitral tribunal on the one hand and the ordinary court on the other hand was not completely clear and claimant chose the wrong alternative. At the time of entering into a contract and a corresponding arbitration agreement, it is often not clear which party will, at a later stage, be the one to bring a claim. Such considerations should therefore be made by both parties.

Furthermore, it will be important for the parties that the power of arbitral tribunals to rule on their jurisdiction is not unduly limited by state courts. If the decision whether or not an arbitral tribunal is competent is reserved exclusively by state courts, this could be seen as a not very arbitration-friendly approach. In international arbitral practice and doctrine the importance of the "competence-competence" principle is generally recognized.

In the following paper we will first take a closer look at the various pitfalls relating to competence. We will then see how Austrian law deals with the issue of competence and will show how the new regulations that came in force as of 1 July 2006, improved the situation. Further, we shall glance at the regulations on this issue in some neighboring countries to which Austria has close economic ties and which could be possible places of arbitration for international enterprises.

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[2]) See, for instance, Section 577 of the Austrian Code of Civil Procedure *(Zivilprozessordnung – ACCP):* "All of the provisions of this part apply if the seat of the arbitral tribunal is in Austria."

[3]) See *Zeiler/Steindl,* The new Austrian Arbitration law 25.

II. Defining the Problem of Competence

A. Relationship Between Competence of State Courts and Arbitral Tribunals in International Regulations

The importance of a tribunal acting within its competence is easily recognizable when looking at the most important international sources of arbitration law and practice:

The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) deals with the consequences of a lack of competence in two essential provisions. First, the competence of arbitral tribunals is (indirectly) regulated in Article II of the New York Convention. Following this provision, the court of a contracting state has to refer the parties to arbitration if the subject matter of the claim is within the scope of an arbitration agreement between the parties, unless the court finds this agreement is null and void, inoperative or incapable of being performed. This provision regulates the relationship of competence between courts and arbitral tribunals and once again demonstrates the vital importance of a valid arbitration agreement for the competence of arbitral tribunals: As long as there is a valid arbitration agreement, state courts have no competence. Second, a lack of jurisdiction leads – upon application by respondent – to refusal of recognition and enforcement of an award under the New York Convention. The lack of jurisdiction may be based on the fact that the arbitration agreement is not valid (Art 5 para 1 lit a New York Convention) or that the award deals with a matter beyond the submission to arbitration (Art 5 para 1 lit c New York Convention).

In the same way, the UNCITRAL Model Law on International Commercial Arbitrations (UML) treats the issue of the arbitral tribunal's competence as a matter of priority. Under the UML, circumstances which lead to a lack of competence may be used both as reasons for recourse to a court against an arbitral award (Art 34 UML) and as grounds for refusing recognition or enforcement (Art 36 UML). These provisions are very similar to the provisions of the New York Convention regarding refusal of recognition and enforcement.

These two major sources of international arbitration law and practice show that the question of the competence of an arbitral tribunal is of importance in every stage of the arbitral proceedings, from the very beginning of the proceedings (or even before)[4]) until well after their end, that is, at the enforcement stage.

Another important issue is the power to decide on the boundaries of the arbitral tribunal's competence. It has been said that "If the question whether the parties are in fact contractually obliged to arbitrate were to be determined by an ordinary court, the international arbitral process would be greatly hampered".[5])

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[4]) See Art II of the New York Convention.

[5]) *Craig, Park, Paulsson,* International Chamber of Commerce Arbitration, 2nd edition (1990) 185.

In national arbitration practice, it is generally regarded as vital that arbitral tribunals have the power to decide upon their own jurisdiction; a principle called "competence-competence" which has been referred to as an "inherent" power of an arbitral tribunal.[6])

The ability of arbitral tribunals to rule on their own jurisdiction is also recognized in the most important institutional rules of arbitration. Art 21 para 1 of the UNCITRAL Arbitration Rules provides that "the arbitral tribunal shall have the power to rule on objections that it has no jurisdiction". Art 23 of the LCIA Arbitration Rules provides a similar right to the arbitral tribunal to rule on its own jurisdiction. Art 6.2 of the ICC Rules of Arbitration involves the ICC Court in the determination of the tribunal's competence, but the decision that an arbitration agreement may exist, prima facie is subject to the tribunal's own decision. It is therefore also based on the principle that the tribunal itself is competent to rule on its own jurisdiction. Likewise, the UML recognizes the principle of competence-competence through Art 16.

However, despite this general recognition of the competence-competence principle, it is recognized as well that the ultimate decision on the jurisdiction of arbitral tribunals is subject to control by the state courts. This is clearly demonstrated by the above-mentioned provisions of the New York Convention and the UML, as the decision on applications for setting aside an award or for refusing recognition or enforcement of an award are made by state courts.

Closely interlinked with the doctrine of competence-competence is the doctrine of separability. This doctrine provides that an arbitration clause in the contract is regarded as separate from, and independent of, the main contract of which it forms part. The main arbitration rules and the model law also recognize this principle. The doctrine allows the tribunal to decide on its own jurisdiction even if, in these proceedings, it turns out that there never was an enforceable agreement to arbitrate.[7])

B. Possible Reasons for Ambiguity of Competence of the Arbitral Tribunal: Defective Arbitration Clauses

The possible reasons for a lack of competence of the arbitral tribunal are manifold. As the tribunal's competence stems from the arbitration agreement or arbitration clause, formal or substantive defects of the arbitration agreement are the primary reasons for challenging the competence of the tribunal. Another possible (related) reason is the lack of arbitrability of the subject matter of the dispute. Whether or not an issue is arbitrable depends on the national law. Generally, most

[6]) *Redfern/Hunter,* Law and Practice of International Commercial Arbitration (2004) 5–39.

[7]) *Redfern/Hunter,* Law and Practice of International Commercial Arbitration (2004) 5–37.

commercial disputes are arbitrable. We will therefore only take a closer look at the most common practical defects that hinder a legally valid arbitration agreement in international commercial contracts.

The arbitration agreement itself may be flawed for many reasons. The first possible stumbling block is of a formal nature. If an arbitration agreement does not fulfill the formal requirements of the applicable law,[8]) it may not be able to provide the basis for the tribunal's jurisdiction. For example, an arbitration agreement which is concluded orally and not recorded by any means, will probably not fulfill the formal requirements for a valid arbitration agreement in most countries. Such an oral agreement definitely does not fulfill the formal requirements under the UML or the New York Convention, which both require that an arbitration agreement be in writing. The lack of authority of the person who signed the arbitral agreement for the party is also regarded as a formal defect of the arbitration agreement, for example, if a contract is not signed by a duly authorized corporate representative such as a manager, but by a simple employee. Such person might very well be empowered to conclude the agreement as such, for example, an international sales contract, but might not have corporate power or specific power of attorney to sign an arbitration clause contained therein. Furthermore, the arbitration agreement could be invalid because the corporate representative is only entitled to sign collectively with another person.

Another possible situation leading to a lack of competence of the arbitral tribunal is when an arbitration agreement that has become inoperable after its (valid) conclusion. This could happen if the parties choose a specific arbitrator or a specific arbitral institution which is no longer available when the conflict arises. In such cases – although one could try to "save" the arbitration agreement by arbitration-friendly interpretation – it has in some cases been held that the arbitration agreement has become inoperable.[9])

Sometimes agreements appear to be arbitration agreements at first glance, but on closer inspection are not, as they do not contain a binding obligation on the parties to submit the dispute to arbitration. If an agreement to arbitrate is not mandatory and exclusive parties may not rely on it. An agreement that disputes "may" be referred to arbitration, for example, is not a binding arbitration agreement.[10])

Another possible scenario could be where the arbitration clause is valid and operable, but the issue in question is not contained in the arbitration agreement. This could be the case if the arbitration agreement is formulated too narrowly, or if the claim is not connected closely enough to the contract.

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[8]) This law is, again, determined by the place of arbitration, i.e. the seat of the arbitral tribunal.

[9]) *Hempel/I. Welser,* Das Schiedsgericht Berlin: Identisch mit dem Schiedsgericht bei der Kammer für Außenhandel der DDR? Zuständig aufgrund alter Schiedsklauseln? ÖJZ 1993, 413.

[10]) *Garnett/Gabriel/Waincymer/Epstein,* A Practical Guide to International Commercial Arbitration (2000) 47.

Actually, the list of defective arbitration clauses is never-ending. Law firms engaged in international arbitration cases often have long lists or even "collections" of arbitration clauses that turned out wrong. Why do so many errors occur in this respect? This is often because parties negotiate long hours about the material contents of the contract and do not specifically focus on the arbitration clause. In this respect, legal advice as to the consequences of choosing a specific arbitral body or agreeing on a specific venue is rarely sought. When it comes to the end of a contract, parties tend to be tired and therefore often do not devote the necessary attention to the arbitration clause. They sometimes just "copy and paste" clauses from other contracts, or simply refer the matter "to arbitration" without specifying any details. The problem that we deal with in this chapter could in the vast majority of all cases have been avoided if the parties had in time been aware of the necessity to clearly set out the competence of the arbitral tribunal they wish to agree on, and if they had taken the necessary formal precautions.

As a consequence, often the question of whether or not the arbitration agreement is valid or whether the subject matter of the dispute is covered by the arbitration agreement is ambiguous and therefore the competence of the arbitral tribunal is also doubtful. In these cases, problems relating to competence easily arise.

C. Consequences of Conflicting Competences

The most obvious consequence of a claim brought before an incompetent arbitral tribunal (or before an ordinary court if there is an arbitration agreement after all) is that the claim will be rejected. This may happen either at the beginning of the proceedings or at a later stage, e.g. after a decision concerning an appeal. If the claim was brought before an incompetent arbitral tribunal, the incompetence in most countries is not even cured by a positive decision of the tribunal. Usually, the award can be set aside or recognition and enforcement can be denied if the tribunal was not competent because of an invalid arbitration agreement.

As mentioned earlier, the decision that the tribunal was ultimately not competent to decide the matter not only leads to frustration of the considerable costs and efforts of the parties and their lawyers, but also may have the effect that the underlying claim has meanwhile become time-barred and may therefore not be raised again before the competent court. The same applies if the claimant regarded the arbitration agreement as invalid and filed a lawsuit before the ordinary court – only to be finally told that the arbitration agreement was valid after all. The later the final decision that the arbitral tribunal was not competent has been made, the worse are the consequences for the party who relied on the arbitration agreement and the competence of the tribunal.

Whether or not proceedings before an incompetent tribunal or an incompetent court interrupt prescription periods is a question of the applicable national law. In some countries (e.g. most civil law countries), time limits are regarded as substantive provisions, so that it is the substantive law that gives us an answer,

while other countries (e.g. common law countries with regard to domestic time limits) regard them as procedural provisions.

In order to provide an attractive venue for arbitration, national regulations should therefore try to avoid or limit the negative effects of conflicts of competence. Regulations which provide for a final decision on competence as early as possible are effective in both minimizing the costs of frustrated proceedings before the wrong body and in minimizing the risk of prescription of claims. Furthermore, national legislation which provides that objections against the tribunal's competence are barred unless they were raised at the first possible opportunity at the proceedings, are usually helpful. They prevent the use of the issue of lack of competence as a "secret weapon" to be raised at the end of the proceedings, possibly when respondent is aware of the fact that he may lose the case and therefore seeks a different approach in order to avoid a negative decision. Legal provisions which demand that any and all objections to the competence of an arbitral tribunal must be raised at the very beginning of the proceedings therefore also prevent abuse.

Furthermore it is important for a national law in favor of arbitration to avoid that a conflict of competence may lead to claims being time barred. One solution would be to allow parallel proceedings until the final decision in respect of competence is made. This is a costly approach and therefore can only be seen as last resort. Another – more party-friendly – approach would be to regard the filing of a lawsuit before an incompetent court or arbitral tribunal as sufficient to interrupt the period of limitation. Contrarily, if the claimant only has the ability to choose either to bring the claim before the arbitral tribunal or before the ordinary court[11]) because respondent may raise the objection of *lis pendens* if the claim is brought before both at the same time, this would be a rather strict approach of the relevant national law.

III. How Does the Austrian Law Deal With the Problem of Conflicting Competences?

As we will see, the position of this question under Austrian law has undergone significant changes in the recent past.

A. Regulations Under the Old Regime

On 1 July 2006, the Arbitration Reform Act *(Schiedsrechts-Änderungsgesetz – AA06)* came into effect. AA06 governs arbitration proceedings that have been initiated on or after this date. However, the validity of arbitration agreements is only governed by the new law if they have been concluded after this date as well. We

[11]) See *Kremslehner's* part further down in this book, p. 127.

therefore have to distinguish between the question of formal validity of the arbitration agreement and aspects governing the arbitration proceedings as such. In the first respect, the facilities of the new law will only help claimants gradually, as the question of whether an arbitration agreement has been concluded in the right form will be answered according to the old law if the contract has been concluded before 1 July 2006. On the other hand, the new regulations concerning the need to raise any objections in respect of competence at the earliest stage and the regulations that reduce the risk of prescription drastically are already in effect for all new proceedings, even if the arbitration agreement as such has still been concluded under the old law. It is therefore necessary to take a look at both the so-called "old regime" and the new regulations. While doing this, we will discover that the Arbitration Reform Act has very much improved the situation for the claimant and – even though Vienna has always been a favorable venue for international arbitration – made an arbitration tribunal seated in Austria even more attractive.

1. Conflict of Competence and Access to State Courts

The old regulations were contained in sections 577 to 599 ACCP in the version of before AA06, herein further referred to as ACCP or the "old regime". Basically, there was no explicit provision in the ACCP governing the relationship between the competence of courts and of arbitral tribunals if a dispute on the validity or scope of an arbitration agreement arose. The solution to this question was therefore provided by the general principles developed by doctrine and case law.

Following case law and leading opinions in legal writing, the existence of an arbitration agreement made the state court incompetent with regard to the subject matter of the arbitration agreement. However, this lack of jurisdiction of the state courts was curable and the state courts became competent if the objection as to lack of jurisdiction was not raised by defendant in due time, that is, before any pleadings with respect to the substance of the matter have been made.[12])

Furthermore, it has been generally recognized in Austrian legal writing that pending arbitral proceedings, after notification of the respondent of the request for arbitration, led to *lis pendens.* This had the effect of barring a trial at the state court, and a state court, because of the prior submission of the matter to the arbitral tribunal, could not have jurisdiction on this matter. Due to this effect of pending arbitral proceedings on the competence of the court, it was not possible to initiate parallel proceedings before the ordinary court.

2. Competence-Competence of the Arbitral Tribunal

Even though the ACCP did not contain any specific regulation providing for the competence-competence principle, before AA06, this principle was already

[12]) *Rechberger/Melis* in *Rechberger,* ZPO[3] (2000), section 577, item 11.

recognized by the old regime. Austrian case law[13]) had earlier stated that an arbitral tribunal may rule on its own jurisdiction. However, state courts had the final decision concerning the competence of the arbitral tribunal as the wrongful assumption of jurisdiction by an arbitral tribunal was a reason for the court to set aside the award under sec 595 para 1 no. 1 and no. 5 ACCP. Such application had to be made within three months after the award had been delivered. On the other hand, a decision in which the arbitral tribunal held that it was not competent was not directly subject to the review by the ordinary court. Such decision could only be reached indirectly, if the matter was brought before the ordinary court and this court declared itself to also be incompetent because it deemed the arbitration agreement to be valid after all. This would result in a very uncomfortable situation for a claimant! Furthermore, it was held to be impermissible to stay the arbitral proceedings for a decision on the validity of an arbitration agreement by the court.

The principle of separability of the arbitration agreement from the main contract has also been recognized by case law albeit with certain restrictions. Therefore, even if the parties claimed that a contract was void from the very beginning, and sought an arbitral award on this issue, the arbitration agreement was not necessarily affected thereby.[14]) The same is true for cases where the contract was originally valid and disputes arose from the later rescission or termination of this contract. A comprehensive arbitration clause covering "all disputes arising out of this contract" would still remain in force and result in the competence of the arbitral tribunal to decide on such disputes.[15])

Under the old law, incompetence of an arbitral tribunal because of formal defects of the arbitration agreement was not cured by going into the merits of a case and by the respondent's attendance at the arbitral proceedings. A formal defect of the arbitration agreement was, in any case, a reason for state courts to set aside an award even if such formal defect was not asserted in the arbitral proceedings and raised by the respondent.

The fact that a denial of competence by the arbitral tribunal was not regarded as an award but only as a mere order and therefore was not subject to challenge only complicated matters, as it was not clear whether the court was bound by the arbitral tribunal's negative decision on its competence.[16]) This means that it was possible for both the arbitral tribunal and the state court to deny their competence.

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[13]) See *Power,* The Austrian Arbitration Act (2006) Section 584, Rz 1; *Fasching,* Zivilprozessrecht (1989) item 2185.

[14]) *Liebscher/Schmid* in *Weigand,* Practitioner's Handbook on International Arbitration (2002) 546.

[15]) OGH 17. 4. 1996, RdW 1997, 136; 22. 9. 1994 ZfRV 1995/12. With regard to the consensual termination of the main contract, the Austrian Supreme Court clarified that the arbitration clause is also deemed terminated.

[16]) This question was disputed in legal writing relating to the old regime, see *Aschauer,* Keine Klage auf Feststellung der Unzuständigkeit des Schiedsgerichts bei anhängigem Schiedsverfahren, wbl 2003, 413.

The competence-competence of arbitral tribunals was further restricted by the admissibility of actions for declaratory judgments by state courts regarding the validity of an arbitration agreement. Although the admissibility of such actions was partly contested by legal commentators, it was recognized by the case law of the Austrian Supreme Court.[17])

3. Lack of Competence and Limitation of a Claim

As a general rule in Austria, the period of limitation is interrupted by filing a lawsuit, only if the lawsuit was filed in the competent court or arbitral tribunal and the proceedings are "properly continued". According to sec 1497 of the Austrian Civil Code *(ABGB),* limitation is not interrupted if the claim is later dismissed because of incompetence of the judicial body before which the claimant chose to bring it. Therefore, a claim could become time-barred, even though a lawsuit had been filed in due time if it ultimately turned out that the court or arbitral tribunal had actually not been competent.[18]) As far as conflicts of competence between two state courts were (and still are) concerned, this problem can be avoided by the possibility of an "application for remittal" *(Überweisungsantrag)* to the competent state court for claimant, according to sec 230a ACCP or sec 261 para 6 ACCP. Such an application for remittal was (and still is) not possible in case of conflicts of competence between state courts and arbitral tribunals. The existence of this problem relating to competence was highlighted by a fairly recent decision of the Austrian Supreme Court[19]) which expressly stated that the bringing of a lawsuit before an incompetent arbitral tribunal did not interrupt the process of limitation of a claim.

This means that under the old regime, there was a real danger that bringing an action before the wrong judicial body could lead to the claim being time barred at the time it actually was brought before the competent venue.[20])

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[17]) *Liebscher/Schmid* in *Weigand,* Practitioner's Handbook on International Arbitration (2002) 549.

[18]) It is not true, as the explanatory comments of the Austrian legislator – see *Kloiber/Rechberger/Oberhammer/Haller,* Das neue Schiedsrecht, ecolex spezial (2006) 205 – assume, that even a claim before an incompetent court or arbitral tribunal interrupted the period of limitation according to the old law. The Supreme Court decision SZ 39/63 does not support this either. On the contrary, this ruling was not concerned with the invalidity of an award because of lack of competence, but with a case where the arbitral tribunal's decision was contrary to mandatory law. In such a case, or if there is a breach of substantive law, of course, this must lead to the possibility to repeat the proceedings, either before an arbitral tribunal once more or – if the award of such a tribunal has already been set aside twice – before the ordinary court without the consequence of prescription. In the other cases, if an award has been set aside for formal reasons, especially because the arbitral tribunal illegally assumed its competence, there was, however, no such interruption.

[19]) OGH 28. 8. 2003, 8 ObA 60/03m.

[20]) *Irene Welser,* Vermischte Fragen aus der schiedsgerichtlichen Praxis in FS Krejci (2001) 1887.

Thus, even a claimant who was – from the very beginning – not sure whether an arbitration agreement was valid or not, was faced with the dilemma of deciding between bringing the claim before an arbitral tribunal or submitting it to the ordinary court. If, in the end, it turned out that he had made the wrong choice, he ran a serious risk that his claim could no longer be submitted to the competent body because of prescription. In other words, he could never be sure until the final decision was delivered, even if he had realized the problem from the very beginning.[21])

Likewise, a situation where it only became apparent during the arbitral proceedings that the arbitration agreement might be void, inoperative or incapable of being performed and therefore not a valid basis for the tribunal's jurisdiction was of utmost gravity for the claimant. Of course, the arbitral tribunal must, throughout the entire arbitral proceedings, acknowledge the potential invalidity of the arbitration agreement. When the invalidity of an arbitration agreement arose only after the claim had already been brought before the tribunal, the only way for the parties to avoid a negative decision of the arbitral tribunal because of lack of competence would therefore have been to conclude a new arbitration agreement before such a decision. But this was often not an option at all; on the contrary, we would regularly face a respondent who would typically be glad to use every single argument he could in order to win the case. He would therefore try to prolong such proceedings as long as possible and definitely not be ready to cure any lack of competence by signing a new agreement or confirming the arbitral tribunal's competence. He would be glad to wait for prescription, especially in case the claim was already or almost time barred! In all such cases, it would clearly have been against the respondent's interests to conclude a new arbitration agreement.

The problem that a negative decision of the arbitral tribunal on its competence could lead to the substantive claim being time barred was intensified by the fact that Austrian law did not provide for the possibility of a binding and challengeable separate award on the issue of competence only. As the tribunal therefore only could decide on the issue of its own jurisdiction in the final award, it was not possible for parties to receive clarification from the arbitral tribunal regarding its competence at an earlier stage.[22])

The risk of a claim becoming time barred because of the claim being filed at the wrong venue was especially high in case of formal defects of arbitration agreements. Firstly, the formalities that had to be met under the old law were somewhat stricter than they are now. For instance, it was generally not sufficient to refer to an

[21]) See in detail *I. Welser,* Vermischte Fragen aus der schiedsgerichtlichen Praxis in FS Krejci (2001) 1886 ff.

[22]) The parties could obtain guidance from state courts by filing an action for declaratory judgment concerning the validity of the arbitration agreement. Commentators argued that it was possible to file such an action even if arbitral proceedings were already pending. However, this probably was not an attractive option for parties as it led to parallel proceedings before court and arbitral tribunals and transferred the (first) decision on competence from arbitral tribunals to courts.

arbitration clause which formed part of the standard terms and conditions of one party.[23]) Likewise, a representative of a party who was not a manager or other legal representative needed a specific written power of attorney that entitled him to sign arbitration agreements.[24]) Secondly, under the old regime, a formal defect of the arbitration agreement was a reason for state courts to set aside an award even if the formal defect was not asserted in the arbitral proceedings. It was therefore possible for the respondent to keep quiet about such defects during the arbitral proceedings and to only disclose these reasons when challenging the award before the ordinary court. Such a course of action by respondents led to a considerable delay in the decision concerning the tribunal's competence and often led to the claimant's claim becoming time barred in the meantime.

Under the old regime it was also not possible to minimize this risk by simultaneously filing a lawsuit in several competent venues, because the prior filing of a claim in the same case with an arbitral tribunal led to lack of jurisdiction of the state court where the same matter was later filed. Because of the doctrine of *lis pendens,* it was also not permissible to bring a claim before an arbitral tribunal after court proceedings were pending.

The old regime therefore offered respondents various opportunities to delay the final decision concerning the jurisdiction. These opportunities, in connection with the principle that the period of limitation was interrupted by filing a lawsuit, only if the lawsuit was filed in the competent court or arbitral tribunal, therefore gave respondents the opportunity to increase the risk of a claim being time barred. Therefore, quite frequently when counseling on the risk of the possible invalidity of an arbitration clause, the claimant's legal counsel would have been happier not to have an arbitration clause at all, because then the competence of the state courts would have been clear.

B. Regulations Under the New Arbitration Act 2006

The reform of the Austrian Arbitration law has prevented Austria from losing its good reputation as a venue for arbitration by, *inter alia,* solving this dilemma.

1. Conflict of Competence and Access to State Courts

AA06 now contains explicit regulations on the consequences of the existence of an arbitration agreement or of pending arbitral proceedings on substantive

[23]) *I. Welser,* Vermischte Fragen aus der schiedsgerichtlichen Praxis in FS Krejci (2001) 1882; HS 5523.

[24]) This changed with the reform of the Austrian Commercial Code (after the reform called "UGB"), which entered into force on 1 January 2007. Section 54 para 1 UGB now expressly states that a power of attorney issued by an entrepreneur ("Handlungsvollmacht") encompasses the entitlement to sign an arbitration agreement.

claims before court in section 584.[25]) The provision distinguishes between the effects of an arbitration agreement and the effects of pending arbitral proceedings.

The effects of an arbitration agreement are regulated by section 584 para 1 AA06. According to this provision, a state court has to reject a claim if the matter in dispute is subject to an arbitration agreement and if the respondent objects in due time (prior to or at the same time as making submissions on the substance of the matter) unless there is no arbitration agreement or it is incapable of being performed. Following section 584 AA06 the court has to decide *ex officio* whether the arbitration agreement is non-existing or inoperable. This provision also clarifies that such court proceedings, despite the existence of an arbitration agreement, do not hinder the commencement or the continuation of arbitral proceedings. Thus, the new Austrian law explicitly allows for parallel proceedings before an ordinary court and an arbitral tribunal.

Section 584 para 3 AA06 regulates the consequences of pending arbitral proceedings and provides that if arbitral proceedings are already pending, no further action concerning the asserted claim before another tribunal or state court is admissible. This does not, however, mean that the problem of competence we dealt with under the old Austrian law still exists. It must be noted that there is an exception to this general principle in case an objection to the jurisdiction of the arbitral tribunal was raised before the arbitral tribunal in due time (that is, at the latest, together with the entering of an appearance in the case, in other words, no later than at the time at which the merits of the case are entered), and a decision of the arbitral tribunal on the matter cannot be obtained "within a reasonable time". This exception is clearly only aimed at preventing a misuse of arbitral proceedings in order to delay court proceedings and does not change the general principle that in case of pending arbitral proceedings the courts cannot decide on the scope of the competence of arbitral tribunals. Furthermore, this regulation shows that it is generally not possible to bring a claim before court as soon as arbitral proceedings are pending. As provided for in section 584 para 1 AA06, the opposite case – the bringing of arbitral proceedings although court proceedings are pending – is possible though.

Apart from these basic regulations on how the state courts must proceed in case of an arbitration agreement or of arbitral proceedings, the new Austrian arbitration law contains even further regulations concerning possible conflicts of competence. Section 584 para 2 AA06 is aimed at preventing a "negative" competence conflict, a situation in which both arbitral tribunal and court deny their jurisdiction. Following section 584 para 2 AA06, a court must not reject a claim on the basis that an arbitral tribunal is competent if such arbitral tribunal before has denied its jurisdiction for the matter in dispute. It has been said that the court is only precluded from referring the parties to the same arbitral tribunal, but not to

[25]) References to the AA06 relate to the new version of the ACCP, applicable to arbitration proceedings initiated and arbitration agreements concluded on or after 1 July 2006.

another arbitral tribunal,[26]) which is one possible way to interpret this regulations, but by no means the only one. If we take a closer look at the wording ("may not reject an action on the grounds that an arbitral tribunal has jurisdiction on the matter"), one could prefer the interpretation that the court is now definitely competent and may no longer refer the parties to any arbitration.

Section 584 AA06 is further aimed at preventing inconsistent statements by parties with regard to the existence of an arbitration agreement. Following this provision, a party which previously revoked the existence of an arbitration agreement cannot deny its existence later, unless the underlying circumstances have changed in the meantime. This ends the respondent's ability to state that the arbitration agreement was invalid while the matter was before the arbitral tribunal while subsequently relying on the arbitration agreement to deny jurisdiction to the the state courts. Such a situation, which could arise under the old law, should now be avoided.

2. Competence-Competence

The competence-competence of arbitral tribunals is now expressly provided for in section 592 AA06. The new regulation goes beyond a mere recognition of the competence-competence, which was – in doctrine and practice – already recognized under the old regime and also provides for the possibility to render a decision on competence either together with the ruling on the merits in the case or by separate award. This possibility of a separate award on jurisdiction is new for Austrian law and corresponds to Art 16 para 3, first sentence UML.

AA06 now also follows the demand to decide on competence at an early stage and to avoid any unnecessary delay. A plea that the tribunal does not have jurisdiction shall be raised not later than at the time of the first submission on the subject matter of the dispute. An objection that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as such matter is raised. It is not possible to object to a general lack of jurisdiction or to an excess of jurisdiction at a later point of time unless the default is sufficiently excused. This provision therefore effectively limits the possibilities of respondents to delay the decision concerning the competence of the arbitral tribunal (and to wait for prescription of the claim). Furthermore, the right to object to the arbitral tribunal's competence is limited by section 583 para 3 AA06. Following this provision, a defect as to the form of the arbitration agreement is cured in arbitral proceedings by the making of submissions on the subject in dispute ("entering an appearance in the case"), if an objection to the defect is not raised, at the latest, at the same time.

The above-mentioned regulations, which limit the right to object during the arbitral proceedings naturally also limit the right to challenge the arbitral award later; they are therefore important milestones towards legal certainty in the sequence of arbitral proceedings.

[26]) *Power,* Austrian Arbitration Act, section 584, Rz 4.

As a basic principle, the competence-competence of the arbitral tribunal is still limited by the possibility of courts to set aside the award. The setting aside of awards is now regulated in sections 611 to 613 AA06. Reasons for setting aside the arbitral award are formulated somewhat differently, although compared to the old law they have not changed much. Again, a claim to set aside an arbitral award must be submitted to court within three months after the arbitral award has been served. The reasons for setting aside the award include situations where there is no valid arbitration agreement, or circumstances where there was a valid arbitration agreement, but the arbitral tribunal denied its jurisdiction and cases where one of the parties was legally incapable of concluding a valid arbitration agreement (section 611 para 2 no. 1 AA06). Section 611 para 2 no. 3 AA06 provides that an award shall be set aside if the arbitral award deals with disputes not covered by the arbitration agreement or contains decisions that exceed the scope of the arbitration agreement or the relief sought by the parties. Those two provisions therefore deal with the lack of competence of the arbitral tribunal and leave the final decision on these issues to state courts.

However, because of the limitations on the rights of parties to raise objections to the arbitral tribunal's jurisdiction, the rights of parties to raise these objections in court proceedings for setting aside an award are also limited. Basically, the scope of the grounds for challenge set forth above are limited to instances where a party has had no opportunity to raise an objection concerning these issues.[27])

According to the last sentence of section 584 para 1 AA06, arbitral proceedings may be commenced or continued or an award may be made despite court proceedings on this issue. Therefore, an arbitral tribunal may continue the arbitral proceedings and render the final award even while a claim for the setting aside of a separate award concerning the competence of the arbitral tribunal is still pending (section 592 para 3 AA06).

Furthermore, based on section 578 AA06, it is no longer regarded as admissible to file declaratory actions to state courts regarding the validity of arbitration agreements.[28]) A party who is not sure where to bring the claim is therefore not entitled to bring this question separately before a state court for decision. This further strengthens the competence-competence of arbitral tribunals.

Although the new law strengthens the competence-competence of the arbitral tribunal, it does not explicitly provide for the separability of the arbitration clause. This lack of regulation was intended by the Austrian legislature, which considered the doctrine of separability as too simplistic.[29]) Therefore the existing case law on this matter, which already provided for a (weaker) form of separability, is still applicable.

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[27]) *Power,* Austrian Arbitration Act 15, section 592, Rz 9.

[28]) *Zeiler,* Schiedsverfahren, Section 578, item 4; *Oberhammer,* Das neue Schiedsrecht 165; doubtfully *Power,* Arbitration Act, Section 578, Rz 3.

[29]) *Zeiler,* Schiedsverfahren, section 592, item 8.

3. Lack of Competence and Limitation of a Claim

Although it is possible to initiate parallel proceedings before a court and an arbitral tribunal (if the claim is first brought before court, and then before the arbitral tribunal), such an approach will not be necessary under the new regulations to avoid prescription. Section 584 para 4 AA06 now provides that if an award is set aside or a claim is rejected because the party applied to the incompetent arbitral tribunal instead of the competent court or vice versa, the proceedings shall be deemed to be properly continued if the actual claim is brought without delay before the competent court or arbitral tribunal. This means that – unlike under the old law – a claim will not be threatened by prescription any more, even if the claimant first made the wrong decision about the competent judicial body.

Commentators have already pointed out that the expression "without delay" is unclear and that a defined time limit, i.e. one of three months, – as recommended by the working group of the Ludwig-Boltzmann institute – would have been preferable.[30]) In order to avoid any ambiguities that may lead to risks of delay and prescription, new lawsuits should be filed as soon as possible after the final decision on incompetence has entered into force.

Another open issue is whether the above-mentioned regulation also encompasses cases where the competent court is a foreign court. As it is not a procedural regulation, but a substantive regulation (the question whether or not a claim is time-barred is a matter of substantive law in Austria), it seems to be justified to treat foreign courts as "courts" within the meaning of the provision.[31]) Because section 584 para 4 AA06 is also applicable if the seat of the arbitral tribunal is outside of Austria, proceedings before foreign arbitral tribunals are included in this provision.

Although there are some uncertainties concerning the extent of this regulation, it is very important, as it has substantially eliminated one important pitfall of competence, thereby increasing the popularity of arbitration. Parties can now avoid having their claims time-barred because of a filing at an incompetent court or arbitral tribunal by simply bringing the lawsuit before the competent court or arbitral tribunal without delay after this question has been decided.

C. *Excursus:* Important Changes in AA06 on Form Requirements for an Arbitration Agreement Which Help to Avoid Conflicts of Competence

It has been shown before that the validity of an arbitration agreement and the competence of an arbitral tribunal are closely linked to each other. For this reason, regulations on the form requirements on arbitration agreements are equally

[30]) *Reiner,* SchiedsRÄG 2006: Wissenswertes zum neuen österreichischen Schiedsrecht, ecolex 2006, 469.

[31]) *Reiner,* The new Austrian Arbitration Law (2006) section 584, item 61.

important for the question of competence. More liberal form requirements set a lower threshold for the validity of an arbitration agreement and as a result for the competence of the arbitral tribunal. It is therefore necessary for legal counsel, when entering into an arbitration agreement, to clearly verify any regulations regarding the formal requirements that might exist for the conclusion of such agreement, and to see that they are met.

One of the major criticisms of the old law has always been the very strict form requirement of arbitration agreements, which caused a lot of problems and insecurities in practice. Therefore, the form requirements are now liberalized under the new regulations, although an arbitration agreement still has to be in writing. The arbitration agreement can either be contained in the document signed by all parties or in any other means of communication (including e-mail), which provide a record of the agreement. The question whether at least each of the documents must be signed (even if only electronically) still remains ambiguous,[32]) so in order to avoid possible pitfalls, the required signature should not be omitted.

Furthermore, references in a contract to another contract containing an arbitration clause now also constitute a valid arbitration agreement, if such reference (according to ordinary contract law) suffices to make the other contract part of the main contract, that is, if it satisfies the general requirements of a contractual reference to a separate document.[33])

Lastly, there is an improvement in connection with the new enterprise law that came into force in Austria on 1 January 2007: As we will recall, a person who is not the legal representative of a firm (such as its manager or director) will, according to section 1008 Austrian Code of Civil Law *(Allgemeines Bürgerliches Gesetzbuch – ABGB),* need a specific power of attorney for signing arbitration agreements.[34]) Under the new regulations, section 54 para 1 Austrian Commercial Code *(Unternehmensgesetzbuch – UGB);* a power of attorney issued by an entrepreneur *(Handlungsvollmacht)* will automatically include the right to sign an arbitration agreement and a specific power of attorney will no longer be needed. Further it is now expressly clarified in section 49 UGB that a so-called "holder of procuration" (a person who has full power of attorney, *Prokurist*) who is deemed to be entitled to conclude any kind of legal actions that the conduct of any business might encompass, does not need a specific power of attorney according to section 1008 ABGB either. This is another step towards making the conclusion of arbitration clauses easier and less defective.

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[32]) See *Power,* Austrian Arbitration Act, Section 583, Rz 3 and 4; *Zeiler,* Schiedsverfahren, Section 583, item 14 ff.

[33]) *Riegler,* "Is Austria Any Different? The New Austrian Arbitration Law in Comparison with the Uncitral Model Law and the German Arbitration Law", Int. A.L.R. 2006, 9 (3) 78.

[34]) This specific power had to be in writing; OGH 26. 4. 2006, 7 Ob 236/05i JBl 2006, 726.

IV. How Do Other Countries Deal With the Issue of Competence

Even though this book is an "Austrian" arbitration yearbook, it is interesting to take a look across the border, to see how some neighboring countries deal with the issues raised above, and whether there are the same possible pitfalls that need to be taken into consideration.

While this look will not be as detailed as the discussion of the legal situation in Austria, it will serve to show that the problems outlined above are in no way restricted to the law of one specific state.

A. Regulations in Hungary

The institutionalization of arbitration in Hungary contributed to the development of an effective alternative to dispute resolution before state courts. The Act of Arbitration was introduced in Hungary in 1994 (Act LXXI of 1994 on Arbitration; "HAA"). The Act is based on the UML, but also reflects the unique legal characteristics of the country. The Act intended to establish a separate legal institution where unnecessary state court interventions are excluded.

Sections 5 para 2 to section 5 para 5 HAA set out the formal requirements for an arbitration agreement. The arbitration agreement must be concluded in writing. Written form has a broad meaning (i.e. telex or other means of telecommunications which ensure a record of the agreement are generally sufficient). As a rule, an agreement is deemed to be in writing if the existence of the agreement is alleged by one of the parties in its statement of claim and not denied by the other in the statement of defense.

1. Conflict of Competence and Access to State Courts

If a valid and binding arbitration agreement has been made by the parties, state courts may not intervene except where so provided in the HAA. According to section 8 HAA, a court before which an action is brought in a matter which is the subject of an arbitration agreement must dismiss the claim without issuing a summons or terminate the proceedings at the request of any party unless the court finds that the arbitration agreement is null and void, inoperative or incapable of being performed. In the latter case, the application for termination must be made in the respondent's counterclaim at the latest. State courts therefore have jurisdiction to determine the validity of the arbitration agreement.

Section 8 (3) of the Act repeats the wording of the UML by stating that arbitral proceedings may nevertheless be commenced or continued and an award may be made while the issue is pending before the court.

In the past, several courts actually transferred claims to arbitral tribunals once they realized that the matter in which an action was brought before them was

subject to an arbitration agreement. Parties also often requested the court to transfer their claim to an arbitral tribunal instead of dismissing the claim or terminating the proceedings. More recent case law and legal writing on this issue clarify that that the previous practice was wrong and that a transfer of claims from state courts to arbitral tribunals is not admissible.

2. Competence-Competence of the Arbitral Tribunal

The Act essentially follows the rules of the Model Law. According to section 24 para 2 HAA, the arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For this purpose, an arbitration clause which forms part of the contract must be treated as an agreement independent from the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void does not automatically entail the invalidity of the arbitration clause.

According to section 24 para 3 HAA, a plea disputing the arbitral tribunal's jurisdiction must be raised no later than at the time of the submission of the statement of defense. A plea arguing that the arbitral tribunal exceeds the scope of the its authority must be raised as soon as the matter alleged to be beyond the scope of arbitral tribunal's authority is raised during the arbitral proceedings. The arbitral tribunal may, in either case, admit a later plea if it considers the delay justified. The fact that a party has appointed, or participated in the appointment of, an arbitrator, does not preclude said party from raising the above plea. This provision is very similar to the corresponding Austrian provision and is also aimed at preventing a party from concealing objections to the tribunal's competence.

In Hungarian arbitration practice, claimants sometimes request the examination of the jurisdiction of the arbitral tribunal as a preliminary question before commencing the proceedings and paying the costs thereof. Practice has shown that this is not possible. The decision on the jurisdiction falls within the competence of the competent arbitral tribunal; therefore no decision on the jurisdiction may be made before setting up the tribunal.[35])

The Act does not expressly deal with the situation where the arbitral tribunal finds that it has no jurisdiction. Hungarian legal commentators have disputed whether arbitrators could be forced by the courts to continue the proceedings contrary to their previous decision. Some authors stressed that the decision of the court must have priority in such cases and they therefore acknowledged the right to order the arbitrators to continue the proceedings. This opinion has been supported by section 5 (1) of Act IV of 1972 on state courts, which provided that if a court finds that it has no jurisdiction; such decision will be binding on any other judicial bodies.[36]) Others representing the contrary point of view stressed that

[35]) *Horváth,* A választottbíráskodás néhány gyakorlati kérdése (Some practical issues of arbitration). Gazdaság és Jog (Economy and Law) 9/2001 p. 5.

[36]) In 1997, Act IV of 1972 was replaced by Act LXVI of 1997. According to the provisions of the new Act, the decisions of the court shall be binding on everyone (Section 7).

there should be no way of appeal, once the arbitral tribunal ruled that it had no jurisdiction, as it would be against the parties' autonomy and the freedom of contract if they were obliged to turn to an arbitral tribunal which had already ruled that it had no competence. These earlier disputes have been settled by today: The legislative commentary attached to section 25 HAA emphasizes that parties may not appeal to state courts because of a negative decision of the arbitral tribunal on its competence and such interpretation has been supported by several court decisions as well.

The arbitral tribunal may rule on a plea concerning its jurisdiction either as a preliminary question or in an award on the merits.

If the arbitral tribunal decides in a separate decision that it has jurisdiction, any party may request the competent court to review the arbitral tribunal's decision, within 30 days after having received notice of that ruling. If the jurisdiction of the arbitral tribunal was affirmed in the award on the merits, the objecting party may initiate court control by requesting the setting aside of the award (section 55 HAA). The arbitral tribunal's competence to rule on its own jurisdiction is therefore subject to court control.

3. Lack of Competence and Limitation of a Claim

Where the claim has been brought before an incompetent court, there is a provision to avoid prescription: After the termination of the court proceedings, the legal effects of the claim (i.e. interruption of statute of limitation) remain in force for 30 days. A party can therefore prevent its claim from becoming time-barred by bringing the lawsuit before the competent arbitral tribunal within this 30 day period.

However, there is no such regulation for the opposite case. It is therefore not possible under Hungarian law to prevent a claim from becoming prescribed simply by bringing the claim before an incompetent tribunal. In order to prevent a claim from becoming prescribed one would have to bring the claim before a court, it is even possible to initiate parallel proceedings. Another – less costly – possibility would be to send the respondent a written request for payment prior to the arbitral proceedings, as under Hungarian law such a request also interrupts the limitation.[37])

B. Regulations in Romania

Arbitration in Romania is regulated by sections 340 to 371 of the Romanian Code of Civil Procedure (RCCP) and by the Regulation concerning the Organisation and Exercise of the International Arbitration Court.[38]) On matters which are

[37]) Basically, one could also argue that a claim before an incompetent arbitral tribunal has the same effect as a written request of payment. However, this does not seem to be accepted in Hungarian literature or case law.

[38]) The Court of International Commercial Arbitration is attached to the Chamber of

not expressly regulated, Romanian doctrine tends to make extensive reference to French arbitration law and practice.[39])

1. Conflict of Competence and Access to State Courts

Following section 343 para 3.1 RCCP, a valid arbitration clause completely excludes state courts' material competence in the related matter. Furthermore, as soon as arbitral proceedings are pending before the arbitration court, state courts are no longer competent to examine the validity of the relevant arbitration clause or arbitration agreement.

Access to state courts is – despite a valid arbitration agreement – always possible if neither party objects to the state court's jurisdiction and competence. A state court has to declare itself to be not competent only in case of an explicit statement of a party referring to an arbitration agreement. Under Romanian law, a state court cannot refuse competence with reference to an arbitration clause *ex officio.*

2. Competence-Competence of Arbitral Tribunals

In principle, following section 159 RCCP and the last sentence of section 158 RCCP, the Romanian arbitration court enjoys "competence-competence". "The arbitration court shall examine its own competence." So – unlike state courts – the Romanian arbitration court is competent to take decisions concerning its own competence *ex officio*[40]).

The remedy against the arbitration court's decision on its competence is a challenge under section 364 RCCP before state courts. This means that even though Romanian law states that the arbitration court shall decide on its competence and jurisdiction as long as it deals with the case, the last word on the arbitration court's competence remains with the state courts.

3. Lack of Competence and Limitation of a Claim

Lawsuits before state courts or requests for arbitration generally stop the limitation of a claim. This effect remains even if the state or arbitration court is later revealed to be incompetent,[41]) as the relevant law makes no difference in this respect. A lawsuit before an incompetent court or arbitral tribunal therefore interrupts the prescription period until there is a binding decision declaring the lack of competence. As soon as this decision has entered into force the prescription period starts afresh. Therefore, there is enough time after the decision on the lack of competence to file a new lawsuit and no time is lost when filing a claim with a pos-

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Commerce and Industry of Romania and was created in 1953 for the settlement of foreign trade disputes.

[39]) *Koloseus/Magureanu,* Schiedsgerichtsbarkeit in Rumänien, eastlex 2005, 151–156.

[40]) Bacaci, Drept arbitrajul, 170–194; Ciobanu, Arbitrajul I, 442–443.

[41]) Art 16 Governmental Decree 167/1958.

sibly incompetent arbitral tribunal or an incompetent court. Therefore, under Romanian law, parallel proceedings (simultaneously before an arbitration court or tribunal and the state court) are not necessary to prevent a claim from becoming time-barred.

C. Regulations in Slovakia

Act No. 244/2002 Coll. on Arbitration Proceedings as amended *(Slovakian Arbitration Act – SAA)* contains very general regulations concerning arbitration. Furthermore, unless stipulated otherwise, the arbitral proceedings are adequately governed by provisions of the Act No. 99/1963 Coll. of the Code of Civil Procedure as amended *(Slovakian Code of Civil Procedure – SCCP)*.

1. Conflict of Competence and Access to State Courts

State courts have no jurisdiction on disputes subject to an arbitration agreement unless both parties give their prior consent to the court's jurisdiction on this matter. In case of an arbitration agreement, the court may only continue the proceedings if it comes to the conclusion that the arbitration agreement is invalid, or that the dispute is not arbitrable, or that there is no arbitration agreement, or that the arbitration proceedings exceed the framework of the jurisdiction granted by the agreement, or if the tribunal refuses to deal with the case.

The parties may agree on arbitration at any time, even after certain disputes have arisen or are pending. The SAA enables the disputing parties, whose dispute has been brought before a state court to agree during the court proceedings that the dispute shall be referred to the arbitration court. Once such agreement is delivered to the court, it shall have the effect of a withdrawal of the claim as well as a consent to such withdrawal. Therefore, after the court receives such agreement, it is bound to terminate proceedings without permitting any further actions by disputing parties.

2. Competence-Competence of Arbitral Tribunals

Slovak Law recognizes the competence-competence of the arbitral tribunal – although with certain limitations. The tribunal is entitled to decide on its jurisdiction, including objections to the existence or validity of the arbitration agreement. If the tribunal finds that it has no jurisdiction it shall terminate the arbitration proceedings. A further important provision in this regard is section 19 SAA, which stipulates that an arbitral tribunal has no jurisdiction if arbitration or court proceedings are pending.

An objection to the arbitral tribunal's jurisdiction must be raised no later than at the time of the submission of the statement of defense. A plea arguing that the arbitral tribunal exceeds the scope of its authority must be raised as soon as the matter alleged to be beyond the scope of arbitral tribunal's authority is raised dur-

ing the arbitral proceedings. The arbitral tribunal may, in either case, admit a later plea if it considers the delay justified. If the objection to the lack of jurisdiction of the tribunal is not raised during the arbitration proceedings, this does not prevent a party from filing a claim for the cancellation of the award under section 40 SAA based on a lack of competence of the tribunal.

An arbitral tribunal may decide on its competence either in a separate decision or in the final award on the merits. If the tribunal confirms its competence in a separate decision, a party can apply to the court to decide upon the objection, but no later than 30 days after the service of the preliminary decision. No legal remedy may be filed against the judgment of the Court in respect of the objection. This provision clearly demonstrates that the courts have the last word on the tribunal's competence. Nevertheless, while these proceedings before state courts are pending, the tribunal may continue the arbitration proceedings and deliver an award. The purpose of this power of the tribunal to continue the arbitration is to ensure that the parties do not prolong the proceedings by filing objections.

The Act does not govern the further procedure after the tribunal has terminated the proceedings; therefore the general rule of Article 104 SCCP applies, which stipulates the obligation of the tribunal to forward the case to the competent tribunal.

3. Lack of Competence and Limitation of a Claim

Under section 104 para 1 SCCP, on finding that it lacks jurisdiction, a state court is obliged to transfer the case to the competent authority. The legal effects of the filing of the law suit remain intact in this case, which means that the prescription period remains interrupted. Although there is no explicit regulation for the opposite case, it is generally assumed that section 104 para 1 SCCP also applies to arbitral tribunals.

Consequently, a lawsuit before an incompetent tribunal or incompetent court generally will not lead to the claim becoming time-barred.

D. Regulations in Poland

The new Polish Arbitration Act *(ustawa o zmianie ustawy – kodeks postępowania cywilnego – PAA)* entered into force at 17 October 2005. The main idea behind the new act was to ratify the UML and thereby to provide for a modern arbitration law.[42])

1. Conflict of Competence and Access to State Courts

In line with international standards, the PAA provides that a state court – upon receiving an objection – has to reject a lawsuit if the subject matter of the

[42]) *Brockhuis/Wildenauer,* Schiedsgerichtsbarkeit in Polen, eastlex 2006, 70.

lawsuit is covered by an arbitration agreement, unless the arbitration agreement is null and void or inoperable or if the arbitral tribunal has stated its incompetence. The PAA also provides, that a state court is bound by the negative decision of an arbitral tribunal regarding its competence. The decisions of the courts of Warsaw regarding the validity of arbitration agreements differ. However, it is clear from the case law of the Polish Supreme Court that the court, which refuses a lawsuit has to decide on the validity of the arbitration clause. Following section 1180 para 3 and section 1165 para 3 PAA, arbitral proceedings may be initiated or continued while the court decision regarding the validity of the arbitration agreement and the competence of the arbitral tribunal is pending.

2. Competence-Competence of Arbitral Tribunals

Like the other laws we have taken a closer look at, Polish law recognizes the competence-competence of the arbitral tribunal with certain limitations. The arbitral tribunal may decide on its competence either through a separate decision or in the final award on the merits. If a tribunal rejects an objection to the tribunal's competence in a resolution, each party can apply for the court decision on this issue within two weeks. This provision clearly demonstrates that the courts have the last word on the tribunal's competence.

Furthermore, the lack of competence of the arbitral tribunal is a reason to challenge an award. Following section 1206 para 1 no. 1 PAA, a party can apply for the award to be set aside if the arbitration agreement was void or inoperable even if the respondent did not object to the arbitral tribunal's competence during the arbitral proceedings.

3. Lack of Competence and Limitation of a Claim

Following Polish case law, the filing of a lawsuit at an incompetent arbitral tribunal does not interrupt the limitation of a claim. However, there is no case law on whether the filing of a lawsuit with an incompetent state court (instead of a competent arbitral tribunal) interrupts the limitation of a claim. Legal commentary on this question is inconsistent, and there are opinions, which state that this should constitute an interruption.

The filing of parallel lawsuits may sometimes be a solution to the problem of a claim becoming time-barred. Although arbitral proceedings may be initiated or continued despite the filing of a lawsuit in a state court, the arbitral tribunal's competence ends if the respondent does not object to the court's competence and gets involved in the merits of the case.

E. Regulations in Germany

1. Conflict of Competence and Access to State Courts

German law does not distinguish between the effects of an arbitration agreement and the effects of pending arbitral proceedings on access to state courts.[43]) Both cases are provided for in section 1032 German Code of Civil Procedure *(Deutsche Zivilprozessordnung – GCCP)*. Following section 1032 para 1 GCCP, a state court has to dismiss a lawsuit if the subject matter of this lawsuit is covered by an arbitration agreement and if the defendant objects prior to the beginning of the main oral hearing. The court does not have to reject the lawsuit if it determines that the arbitration agreement is null and void or inoperable. This regulation is similar to the Austrian regulation on the effects of an arbitration agreement, but there are important differences. The most important difference is that German law does not differ between the effects of an arbitration agreement and pending arbitral proceedings. Furthermore, there is a difference in the time limit for the objection: Under German law the objection has to be raised before the first hearing on the merits of the dispute and therefore does not have to be raised in a possible earlier written submission on the subject matter.

Section 1032 para 2 GCCP provides that until the arbitral tribunal is constituted, an application may be made to the court for a declaratory statement concerning the admissibility of arbitral proceedings.

Section 1032 para 3 GCCP provides that arbitral proceedings may be initiated or continued and an arbitration award may be rendered while an action before court according to para 1 or 2 is pending. This provision corresponds to the similar Austrian provision.

2. Competence-Competence of the Arbitral Tribunal

The competence-competence of the arbitral tribunal is recognized in section 1040 GCCP. If there is an objection to the arbitral tribunal's competence, the arbitral tribunal shall rule on this objection by means of a separate award, if it considers that it has jurisdiction. However, German law also reserves the final decision on the tribunal's competence for state courts. This is especially obvious from section 1040 para 3 GCCP, which provides that parties can apply to state courts within one month against the separate decision of the arbitral tribunal regarding its competence.

German law also contains procedural regulations concerning the time of objections to the jurisdiction of the arbitral tribunals which are similar to Austrian regulations. Following section 1040 para 2 GCCP, such objection shall be raised not later than at the submission of the statement of defense (pleas that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as such matter is raised).

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[43]) *Stein/Jonas/Schlosser*[22], § 1032, item 1.

German law expressly provides for separability of the arbitration agreement, which can be seen as a major difference between Austrian and German regulation. Section 1040 para 1 GCCP provides that for purposes of determination of competence "an arbitration clause shall be treated as an agreement independent from the other terms of the contract". The German regulations on separability are therefore in conformity with the international standards.

3. Lack of Competence and Limitation of a Claim

The effects of an arbitration agreement on the limitation of a claim are regulated by section 204 of the German Code of Civil Law. Under section 204 para 1 no. 11, the limitation of a claim is interrupted by the starting of arbitral proceedings. This interruption ends six months after the decision of the tribunal has become binding or after the arbitral proceedings have ended in any other way.

It is also recognized that the filing of a lawsuit before an incompetent court interrupts the limitation of a claim.[44]) There is no apparent reason why this argument should not also apply to the filing of a lawsuit before an incompetent arbitral tribunal. As the interruption of the limitation continues for six months after the claim has been rejected by an incompetent court or tribunal, it is possible to initiate new proceedings within this period before the competent tribunal/court without the claim becoming time-barred.

V. Conclusion

As we have seen, the pitfalls of competence exist in most procedural laws. All in all, the changes in Austrian regulations on conflicts of competence between state courts and arbitral tribunals via the AA06 can be seen as very favorable to arbitration. These regulations, some of which cannot be found in neighboring laws, remove quite a few important problems relating to competence. The new Austrian arbitration law has also eased the situation in respect of possible prescription where the existence of a valid arbitration agreement is doubtful.

On the other hand, we have seen that the Austrian regulations are basically in line with the UML and do not differ greatly from what international parties would expect.

To summarize, Vienna has always been an interesting place for arbitration, especially for east-west contracts. The new arbitration law further encourages parties to choose Vienna – or Austria – as a place of arbitration and as the seat of their arbitral tribunal.

[44]) *Palandt,* Bürgerliches Gesetzbuch[62] (2003) § 304, item 5.