The Scope of Arbitration Clauses – Or "All Disputes Arising out of or in Connection with this Contract …"

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I. Introduction

The wording of an arbitration clause is an important factor in determining whether a dispute is to be referred to arbitration or to state court proceedings. This is even true when choosing recommended model clauses. Uncertainties regarding the scope of the arbitration clause often lead to disputes concerning the jurisdiction of the arbitral tribunal which in turn will make it necessary for the court or the arbitral tribunal to conduct (costly and time consuming) procedural steps to clarify the issue of jurisdiction, before dealing with the substantive claims.

Disputes regarding the scope of the arbitration clause may in some cases be attributable to such clauses being drafted too narrowly. Sometimes, the arbitration clause in a commercial contract is the clause least considered (and thus famously also referred to as the "midnight clause"[1]) and sometimes it is simply "copied and pasted" from one contract to another[2]). Such practices can, frequently, lead to disputes as to the scope of the clause.

Even however, when the arbitration clause is drafted carefully with due consideration given to all foreseeable implications of the wording of the clause, conflicts on whether a certain dispute is encompassed by this clause might nonetheless ensue.

A point of further concern in relation to the scope of the arbitration clause arises in cases where the claims are only loosely connected to the contract which contains the arbitration clause (for example, if a claim is based on an auxiliary agreement to the main contract including the arbitration clause).

This contribution is aimed at giving an overview of the different approaches in interpreting the scope of arbitration agreements. In particular it will look at the guidelines developed by the Austrian Supreme Court.

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[1]) Blackaby et al., Redfern and Hunter on International Arbitration para. 2.04 (5th ed. 2009).

[2]) Irene Welser, *Pitfalls of Competence, in* Austrian Arbitration Yearbook 2007, 3 (Klausegger et al. eds., 2007).

II. Wording and Interpretation of Arbitration Clauses

Arbitration clauses may refer either specific, or general disputes, arising out of a contractual or other legal relationship, to arbitration.[3]) To limit possible conflicts as to whether a matter falls under the arbitration clause, it is deemed advisable to draw such clauses as widely as possible.[4]) It is argued that broadly worded arbitration clauses may prevent the fragmentation of disputes between different *fora* and avoid additional complications arising when the underlying contract itself turns out to be invalid.[5]) This is taken account of in the standard arbitration clauses recommended by various international arbitral organizations. Common wordings include:

> *"all disputes arising out of or in connection with the present contract"*[6]),
> *"all disputes arising out of this contract or related to its violation, termination or nullity"*[7]) or
> *"any dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination"*.[8])

The model arbitration clause according to the new Swiss Rules refers to *"any dispute, controversy, or claim, arising out of, or in relation to, this contract …"*[9]).

Although the meaning of these clauses appears to be relatively clear, practical experience has shown that even these broadly worded standard clauses contain some ambiguity as to the scope of their application.

When a lawsuit or a request for arbitration is filed, it is up to the court or arbitral tribunal to decide on the applicability of the arbitration clause. Whether or not the dispute at hand falls within its scope has to be established by means of interpretation. The interpretation of an arbitration clause follows the rules of the law applicable to the clause itself.[10]) Under Austrian Law, the court or tribunal will

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[3]) *See* Karl Heinz Schwab & Gerhard Walter, Schiedsgerichtsbarkeit 25 (7th ed. 2005).

[4]) Blackaby et al., *supra,* para. 2.65.

[5]) Alejandro I. Garcia, *Scope of arbitration clauses and carve-out clauses: erring on the side of caution or on the side of daring?* Kluwer Arbitration Blog (2011); http://kluwerarbitrationblog.com/blog/2012/05/25/scope-of-arbitration-clauses-and-carve-out-clauses-erring-on-the-side-of-caution-or-on-the-side-of-daring/ (last visited May 31, 2012).

[6]) ICC standard clause, www.iccwbo.org/court/arbitration/id4114/index.html (last visited May 21, 2012).

[7]) VIAC standard clause, www.viac.eu/en/recommended-arbitration-clause.html (last visited May 21, 2012).

[8]) LCIA standard clause, www.lcia.org/Dispute_Resolution_Services/, LCIA_Recommended_Clauses.aspx (last visited May 21, 2012).

[9]) www.swissarbitration.org/sa/download/SRIA_english_2012.pdf (last visited on July 3, 2012).

[10]) Christian Hausmaninger, *IV/1, in* Kommentar zu den Zilverprozessgesetzen sec 581 para. 228 and 266 (Fasching & Konecny eds., 2nd ed., 2005); Christian Koller, *Die Schiedsvereinbarung, in* Schiedsverfahrensrecht 91 para. 3/259 (Liebscher & Oberhammer & Rech-

apply the principles on the interpretation of substantive contract law. According to such principles the joint intention of the parties are of foremost importance even when they are not reflected in the wording of the clause. If, even considering the intention of the parties, the meaning of the arbitration clause remains ambiguous, the clause has to be interpreted according to generally accepted standards.[11])

III. International Interpretation Tendencies

On an international level, courts tend to apply a broad interpretation to the scope of arbitration agreements.[12]) The prevailing opinion in Germany as well as Switzerland favors a wide interpretation of broadly-worded arbitration clauses that creates an all-encompassing jurisdiction of the arbitral tribunal.[13]) Arbitration clauses dealing with future contractual disputes are therefore generally believed to also encompass the disputes arising from the *non*-contractual obligations of the parties, insofar as these relate to the execution of the contract.[14]) For example, where the articles of association of a Limited company, which according to its wording encompasses all disputes arising between the company and the shareholders as well as between the shareholders *inter se,* contains an arbitration clause, then this clause is deemed to also encompass the obligations of the shareholders arising under company law.[15]) It is the prevailing opinion, that in the interest of the parties, it is beneficial to have all disputes decided by the same arbitration tribunal as this will avoid the risk of split proceedings.[16])

Whether the pro-arbitration tendency of German courts in respect of non-contractual obligations extends to disputes arising out of separate contracts is however, unclear: On the one hand, it is said that an arbitration clause in a framework agreement encompasses disputes from all shipments that take place in the context of this contract.[17]) Furthermore, an arbitration clause from one contract can encompass disputes under another contract if the agreements form a "unified contractual scheme".[18]) On the other hand, the applicability of the arbitration

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berger eds., 2012); Peter Schlosser, Das Recht der Internationalen Privaten Schiedsgerichtsbarkeit para. 420 (2nd ed., 1989).

[11]) Sec 914, Austrian Code of Civil Law (Allgemeines bürgerliches Gesetzbuch – ABGB); Koller, *supra* note 1010, paras. 3/239 and 3/240 *et seq.; see* OGH, Jun 24, 2004, docket no. 6 Ob 122/04s; OGH, Nov 6, 2008, docket no. 6 Ob 194/08k.

[12]) Koller, *supra* note 10, at para. 3/260.

[13]) Koller, *supra* note 10, at para. 3/259; *see also* Hausmaninger, *supra* note 10, at sec 581 para. 227; Stefan Kröll, *Die schiedsrechtliche Rechtsprechung 2004,* SchiedsVZ 139, 141 (2005); Schwab & Walter, *supra* note 3, 25.

[14]) Schwab & Walter, *supra* note 3, at 25.

[15]) Schwab & Walter, *supra* note 3, at 26.

[16]) Hausmaninger, *supra* note 10, at sec 581 para. 227; Kröll, *supra* note 13, at 141.

[17]) Schwab & Walter, *supra* note 3, at 25.

[18]) Schwab & Walter, *supra* note 3, at 25.

clause, found within a brokerage agreement for a business acquisition, in respect of a claim for the brokerage fee arising from the sale of business property was denied by the OLG Celle.[19]) In this case, the brokerage agreement provided for the possibility to opt for a sale of the property (instead of a lease), however, such an option had not been utilized when the business itself was sold. The sales contract for the property was instead concluded at a later date (and between different parties). The fact that the arbitration clause in the brokerage agreement encompassed *"all disputes in connection with the business acquisition"* was not sufficient for the OLG Celle to apply it to the separate sales contract. It would appear that even though the clause was broadly worded, the contract that included the arbitration clause and the contract under which the disputes arose were viewed by the court to have been too loosely connected.

Courts from Common Law Countries famously used to distinguish between "narrow" arbitration agreements (where only disputes *"out of the contract"* were referred to arbitration) and "wide" clauses (those that encompassed disputes out of the contract as well as those *"in connection"* with the contract). The narrow clauses were held to include only disputes on contractual obligations, while wide clauses also applied to non-contractual obligations in connection with the contractual relationship of the parties.[20]) This view was heavily criticized as being too formalized, not reflecting the true intentions of the parties, and unnecessarily fragmenting separate proceedings that deal with the same facts merely because they are based on different legal grounds.[21])

In the groundbreaking decision of *"Fiona Trust"*,[22]) the UK courts abandoned this previous line of authority. The case looked at eight charter party contracts concluded between ship owners and charterers. The contracts contained a clause according to which *"any dispute arising under this charter"* could be referred to arbitration, if one of the parties decided so. The claimant argued that the defendant had procured the charter by bribery. In order to answer the question whether such a claim fell within the scope of the – from the traditional point of view – narrow arbitration clause, the House of Lords firstly stated that businesspeople in particular, are assumed to have entered into agreements to achieve some rational commercial purpose.[23]) Secondly, the court held that when interpreting the arbitration clause it was necessary to start from the assumption that the parties, as rational businessmen, were likely to have intended any dispute arising out of the re-

[19]) *See* Kröll, *supra* note 3, at 141.

[20]) Schlosser, *supra* note 1010, para. 421. *E.g. Kinoshita & Co Ltd et al.* v. *American Oceanic Corporation,* 287 F.2d 951 (U.S. Court of Appeals, 2nd Circuit 1961); *Mediteranean Enterprises Inc* v. *Ssangyong Corporation* 708 F.2d 1458 (U.S. Court of Appeals, 9th Circuit 1983); *Tracer Research Corporation* v. *National Environmental Services Company,* 42 F.3d 1292 (U.S. Court of Appeals, 9th Circuit 1994).

[21]) *See* Koller, *supra* note 1010, at para. 3/267; Schlosser, *supra* note 1010, at para. 421.

[22]) *Premium Nafta Products Limited and others* v. *Fili Shipping Company Limited and others,* (UKHL 2007) 40.

[23]) *Fiona Trust, supra* note 22, at para. 5.

lationship into which they had entered to be decided by the same tribunal. Accordingly, any clause was to be construed in accordance with this presumption unless the language made it clear that certain questions were intended to be excluded.[24]) The "*fine verbal distinction*" between wide and narrow clauses was abandoned, as it "*reflected no credit upon English Commercial Law*".[25])

In the U.S., however, the distinction between wide and narrow clauses has recently been upheld.[26]) In *Cape Flattery Ltd* v. *Titan Maritime LLC,*[27]) for example, a ship-owner and a salvage company contracted to have a stranded vessel, which had run aground on a submerged coral reef near Hawaii, salvaged. The agreement contained a "narrow" arbitration clause, which referred "*any dispute arising under this agreement*" to arbitration in London. The vessel was successfully removed. However, in the process the defendant inflicted serious damage upon the reef. The claimant, as the stranded vessel's owner, was liable to the U.S. government and sued the defendant for indemnity and/or contribution under the Oil Pollution Act of 1990.[28]) The 9th Circuit Court of Appeals held that the arbitration clause was not applicable to this lawsuit as the claim was based on tort rather than contract and the clause only applied to disputes relating to the interpretation and performance of the contract itself.

Interestingly, the justification for the distinction between narrow and wide arbitration clauses seems to be that these clauses have been understood in a certain way in the past. The 9th Circuit Court of Appeals referred to existing case-law which had made this distinction and argued that those judgments had already existed when the parties entered into their agreement: "*There is no reason to believe that the experienced lawyers representing both parties intended that the language they chose would be interpreted differently than it had been in those cases.*"

IV. Austrian Case Law

The Austrian Supreme Court tends to interpret arbitration agreements in *favor validitatis*[29]) and favors an expansive interpretation of the scope of arbitration agreements.[30]) An extensive interpretation finds its limits where certain disputes are either expressly excluded from the arbitration clause or where there is no

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[24]) *Fiona Trust, supra,* note ,22 at para. 13. *See also* Richard M. Franklin, *Special Considerations in Drafting an Arbitration Clause and Conducting an Arbitration with a U.S. Counterparty, in* Austrian Arbitration Yearbook 2009, 93, 96 (Klausegger et al. eds., 2009); Koller, *supra* note 10, at para. 3/260.

[25]) *Fiona Trust, supra* note 22, at paras. 12 and 37.

[26]) Franklin, *supra* note 24, at 96.

[27]) *Cape Flattery Ltd* v. *Titan Maritime, LLC* (U.S. Court of Appeals, 9th Circuit 2011).

[28]) 33 U.S.C. § 2701 *et seq.*

[29]) Hausmaninger, *supra* note 10, sec 581 para. 193.

[30]) Hausmaninger, *supra* note 10, sec 581 para. 193, 226; Fremuth-Wolf, *sec 581 para. 48, in* Arbitration Law of Austria: Practice and Procedure (Riegler et al. eds., 2012).

context to the agreement containing the arbitration agreement.[31]) Within these limits an extensive interpretation is not only permissible, but necessary.[32]) Given two equally likely interpretations, the Austrian Supreme Court usually favors an interpretation according to which the arbitration clause is valid.[33]) Aside from that, the Austrian Supreme Court decisions do not follow a general rule that arbitration clauses are to be interpreted in a wide or in a narrow sense irrespective of the case at hand[34]).

The interpretation principles described in II above tend to leave a great deal of space for individual interpretation when resolving each individual case.

The key decisions discussed below may help in the determining the scope of arbitration clauses in accordance with Austrian law.

A. Disputes on Contractual Obligations

When the applicant in arbitral proceedings bases his claim on rights conferred to him by the contract which also contains the arbitration clause, Austrian courts will, in most cases, deem that clause applicable. Questions as to the scope of the arbitration clause may arise, however, if the claim challenges the validity of the contract itself or if it is unclear whether a claim does result from a contract:

The problem of validity is dealt with in **OGH, Feb 5, 2008, docket no. 10 Ob 120/07f**[35]). A service contract for the construction of a sewerage facility contained an arbitration clause according to which *any and all disputes arising out of the contract as well as out of future supplementary contracts* had to be dealt with by arbitration. In court proceedings aimed at the annulment of an arbitral award based on that clause, the claimant argued that the arbitration clause had not entered into force as the contract itself was invalid due to dissent between the parties. The Austrian Supreme Court, however, decided that as the arbitration clause was clearly worded and intended to cover any possible disputes out of the contractual relationship between the parties, there could be no doubt that the question of the validity of the contract itself was encompassed by the clause.

In **OGH, Feb 21, 1996, docket no. 7 Ob 502/96,** a service contract with an architect contained a clause, according to which, *disputes between the parties resulting from this contract* had to be decided by arbitration. The builder of the house filed a lawsuit against the architect, claiming that the building in question had caused damages to an adjoining house, which he was obligated to compensate. He demanded that the architect reimburse the damages he had been required to pay.

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[31]) Hausmaninger, *supra* note 10, sec 581 para. 249.

[32]) Hausmaninger, *supra* note 10, sec 581 para. 193; OGH, Nov 11, 2011 docket no. 3 Ob 191/11a.

[33]) Koller, *supra* note 10, at para. 3/242; OGH, Nov 28, 2000, docket no. 1 Ob 126/00m; OGH, Feb 22, 2007, docket no. 3 Ob 281/06d; OGH, Aug 26, 2008, docket no. 4 Ob 80/08f.

[34]) Koller, *supra* note 10, at para. 3/243.

[35]) ecolex 2008/152 = bbl 2008/136.

In the court proceedings, one of the points in question was whether this indemnity claim against the architect could be based on the contract at all. As to the scope of the arbitration clause, the Supreme Court held that – unless provided for otherwise – an arbitration clause for disputes arising out of a contract also encompassed disputes as to whether a claim could be based on the contract or not.

In **OGH, Jun 25, 1996, docket no. 1 Ob 2193/96y**[36]), an association of banks had a statute containing the clause that *all disputes concerning the affairs of the association* were referred to an arbitral tribunal. In the case at hand, the association had decided that its member-banks needed to deposit an additional reserve and had unilaterally charged this reserve to the bank accounts of the member banks. The claimant, a member bank, argued that the retention of the reserve was illegitimate and had caused him monetary damages, as it had forced him to incur additional debt.

During the proceedings it was questioned whether this claim was a matter *"concerning the affairs of the association"* whereby it would fall within the ambit of the arbitration clause. The Austrian Supreme Court held that the question of whether or not it was within the rights of the association to demand the additional reserve was indeed a matter concerning *"the affairs of the association"*. However, this issue arose in the context of the claimant's claim for damages. The court determined that this presented only a preliminary question and a mere preliminary question did not suffice for the applicability of the arbitration clause.

The decision **OGH, Aug 29, 2002, docket no. 6 Ob 155/02s**[37]), affirms this principle.[38]) A shareholder agreement aimed at influencing the decisions of a holding company contained an arbitration clause for *disputes out of the contract.* One of the shareholders claimed that another shareholder had offered to buy his shares, however, consequently changed his mind and failed to pay the price due to the claimant. The Supreme Court reasoned that in this case the arbitration clause was not applicable as the shareholder agreement in no way governed the sale or purchase of its member's shares. For a dispute to qualify as arising out of the shareholder agreement, it would have been required that provisions of the contract were relevant to the question at hand. It was not sufficient that the contract was an element of a preliminary question.

B. Disputes on Non-Contractual Obligations

Problems as to the scope of an arbitration clause often arise when a claim can be based on both the contractual as well as the non-contractual obligations of the defendant:

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[36]) HS 27.249

[37]) RdW 2003/56 = wbl 2003/53

[38]) *See also* OGH, Dec 12, 2002, docket no. 6 Ob 62/02i.

In **OGH, Jun 19, 1997, docket no. 6 Ob 2213/96a,** a company contract between taxi drivers aimed at the establishment of a radio center included a clause, according to which *disputes between the partners arising out of the contract* had to be decided by "the arbitral tribunal of the Chamber of Commerce". The defendant was a member of the company but he also cooperated with a rival taxi radio center. The lawsuit was filed by other members of the company and aimed at a cease-and-desist order prohibiting the claimant from supporting the rival. The claim was based on a breach of loyalty by the defendants under both the contract itself and Austrian company law. According to the Austrian Supreme Court an arbitration clause for disputes out of a contract will be applicable in such cases, notwithstanding the fact that the claim in question could also be based on legal provisions other than the contract.

Arguably the most important decision in this context is **OGH, Aug 26, 2008, docket no. 4 Ob 80/08f**[39]). The claimant and defendant were parties to a contract for the distribution of blood pressure monitors. The defendant was the wholesale dealer responsible for large parts of Europe and conferred upon the claimant the right to distribute the monitors in Austria. The distribution contract contained the clause that *all disputes out of this contract* were to be settled by negotiations. Failing a consensual resolution, the dispute had to be decided on by means of arbitration. The claimant felt that he was being discriminated against by the producer as well as the wholesale dealer because he had to pay significantly higher prices for the blood pressure monitors than the German distributor (who was a subsidiary of the wholesale dealer). Furthermore, certain types of monitors remained completely unavailable to the claimant. The claimant therefore filed a lawsuit aimed at a cease-and-desist order, prohibiting the defendant from discriminating against him by charging higher prices and refusing to provide him with digital blood pressure monitors. He based his claim on a breach of contractual obligations as well as a violation of competition and anti-trust law.

The Austrian Supreme Court held that given two equally plausible meanings of a clause, the interpretation that allows for the validity of the arbitration clause and the applicability on a dispute is to be favored. Arbitration agreements covering *"all disputes out of a contract"* apply to claims for damages out of the breach of contractual obligations. They furthermore encompass claims based on unjust enrichment and tort if the contractual violation and the harmful action are connected in a way that they must be seen as forming a unity with the contractual obligations. The scope of such arbitral agreements does not, however, include non-contractual obligations that are only very loosely connected to the contract.

In the authors' opinion, the connection of contractual and non-contractual claims is one of the questions where there is a lot to be said in favour of a pro-arbitration bias. First of all, practical experience has shown that parties often do not reflect in detail which disputes will fall within the scope of an arbitration clause when drafting their agreements. This is especially true as far as non-

[39]) ecolex 2009/42 = EvBl 2009/12

contractual obligations are concerned. Secondly, even after a dispute has arisen it will often be in the interest of the parties that disputes which rest on essentially the same factual grounds are not torn apart and tried separately solely because the claimant based them on several legal provisions.[40]) The Austrian Supreme Court's tendency not to apply too much weight to whether a clause refers to disputes *"out of a contract"* or *"out of or in connection with a contract"* to arbitration, is preferable to a strict and somewhat artificial distinction between "broad" and "narrow" clauses, where only the "broad" clauses *("out of or in connection with the contract")* apply to claims based on non-contractual obligations.[41])

C. Supplementary Agreements

With regards to supplementary agreements and additional contracts to the one containing the arbitration clause, the applicability of such a clause is clear when the parties expressly provide for its applicability in the additional agreement.[42]) If this is not the case, the Austrian Supreme Court distinguishes between agreements that have been anticipated in the original contract and those that have not:

In **OGH, Oct 15, 1987 docket no. 6 Ob 658/87** the Supreme Court laid down basic principles for the latter category. In the matter at hand, claimant and defendant were parties of a framework agreement, covering the breeding of chicken and the delivery of eggs. The strikingly wide arbitration clause generally referred *"disputes between the parties"* to an institutional arbitration tribunal. When two of the deliveries in the context of the frame contract were faulty, the parties drew up an agreement settling monetary claims from these deliveries. Concerning a dispute out of this agreement the Austrian Supreme Court held that an expansive interpretation of an arbitration clause so that it encompasses supplementary agreements to the original contract was not permissible in this case. According to the court, the parties of the framework agreement could not be deemed to have intended the application of an arbitration clause to disputes arising from future, additional or supplementary agreements.

On the other hand, in **OGH, May 5, 1998, docket no. 3 Ob 2372/96m**[43]), the Supreme Court did apply an arbitration clause to disputes from supplementary agreements. A service contract aimed at the construction of terrace houses included an arbitration clause for *disputes between the parties.* Furthermore, it contained provisions not only for deliveries and service as currently projected, but also for the handling of potentially necessary additional work. The claim in ques-

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[40]) *See* Koller, *supra* note 10, at para. 3/258; Schlosser, *supra* note 10, at para. 421.

[41]) This view used to be adopted by common law courts. *See* Koller, *supra* note 10, at para. 3/260; Schlosser, *supra* note 10, at para. 421.

[42]) *See* Koller, *supra* note 10, at para. 3/271.

[43]) SZ 71/82 = JBl 1999, 390.

tion was based on a supplementary agreement in connection with the building project. The Austrian Supreme Court reasoned that, as these supplementary agreements were connected to the original contract and as the original contract had explicitly taken the possibility of further agreements into account, the arbitration clause also applied to disputes resulting from the supplementary contracts.

OGH, Apr 3, 2001, docket no. 4 Ob 37/01x[44]), dealt with the articles of association of a limited liability corporation, that contained a clause according to which, if *a dispute between shareholders arising out of the contract* could not be resolved by negotiations, it was to be decided by arbitration. One of the shareholders was excluded from the company due to violations of the company contract. He filed a lawsuit against the other shareholders aimed at the annulment of the exclusion. Furthermore, he argued that he had rented out his office to the corporation and rendered tax advisory services, for which the company owed him a certain percentage of the revenue.

The Supreme Court held that in this case the parties intended that all disputes out of the company agreement should be decided by arbitration. A lawsuit based on the articles of association was not out of the scope of the arbitration clause because additional agreements between the parties needed to be considered as well. However, if the dispute resulted solely from an agreement that was independent of the company contract, the arbitration clause would not apply.

This decision was highly criticized by *Reich-Rohrwig* and *Karollus-Bruner* for its uncommonly wide interpretation of the arbitration clause. *Reich-Rohrwig* and *Karollus-Bruner*[45]) argued not only that the Supreme Court had disregarded established principles for the interpretation of articles of association, but that the Supreme Court had also exaggerated the scope of the arbitration clause by applying it to rights and obligations of the parties that did not result from the company contract itself, but arose out of separate agreements.

Aside from this last decision which may read as an indication for an even broader scope of application it seems to the authors that the underlying principle which can be deduced is that – unless provided for otherwise – an arbitration clause in a contract covers disputes from ancillary or supplementary agreements if such agreements are closely connected or if there is an indication that the parties have taken the possibility of such supplementary contracts into account when agreeing on the arbitration clause. The main indicator on whether the parties have anticipated this possibility is whether the contract provides for future supplementary agreements. Finally the scope of an arbitration clause will have to be determined by individual interpretation. The intention of the parties or – if such intention cannot be established in the proceedings – the intention reasonable parties would have had prevails. While it may be assumed that parties ordinarily do not intend to split disputes which are closely linked between different *fora*[46]) an exten-

[44]) ecolex 2001/350.

[45]) Reich-Rohrwig & Karollus-Bruner, comments on ecolex 2001/350.

[46]) OLG, München Oct 13, 2004 docket no. 3722/04, see also *supra* note 5.

sive interpretation is not permissible where certain disputes are expressly excluded from the scope of a contract[47]) or where the contract containing the arbitration clause is not relevant to the dispute[48]).

The decision **OGH, Mar 30, 2009, docket no. 7 Ob 266/08f**[49]), which does not deal with a supplementary agreement, but may nevertheless be considered in this context supports the key importance of the parties' intention:

In this case the defendant wanted to sell his power generation business and to this end set up an organized process for the solicitation of offers. To take part in this process, potential buyers had to sign a confidentiality agreement which included a clause that *all disputes arising out of or in connection with the present contract* were to be resolved in arbitration proceedings under the ICC rules. The claimant was one of the – ultimately unsuccessful – bidders and demanded compensation for his frustrated costs of taking part in the proceedings. He claimed that had he been given all the relevant information in the first place, he would not have taken part in the process. The claim was based on the legal ground of *culpa in contrahendo.* To determine whether or not this claim fell within the scope of the arbitration clause found in the confidentiality agreement, the Austrian Supreme Court took a close look at the complete contents of the agreement and found that several of its provisions referred to rights and duties of the parties during the bidder process. The Austrian Supreme Court argued that, according to the wording as well as the intention of the contract, claims based on *culpa in contrahendo* were indeed provided for in the confidentiality agreement. The arbitration clause was deemed to be applicable.

D. Modification of the Contract

Questions as to the temporal scope of an arbitration clause arise when the contract, which includes the clause, is later adapted or modified:

In the context of a company contract the Austrian Supreme Court, **OGH, Dec 15, 1971 docket no. 5 Ob 208/71,** ruled in favor of the applicability of an arbitration clause from the original contract to a dispute under a modified version of said contract. The arbitration clause referred *all disputes between the partners or their legal successors* to arbitration if they occurred *in connection with rights and obligations of the contract as well as its interpretation and application.* The Supreme Court held that this arbitration clause was meant to apply to disputes under the company contract in its every version. That is why, according to the Supreme Court, disputes arising out of modified versions of the contract also fell within the scope of the clause.

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[47]) OGH, Mar 10, 1987 docket no. 2 Ob 529/87.

[48]) *See supra* notes 37 and 38.

[49]) RdW 2009/514.

In **OGH, Jun 17, 2003, docket no. 5 Ob 112/03m**[50]), this principle is repeated and somewhat clarified. The arbitration clause in question was part of the statute of a registered cooperative and referred all disputes arising out of it to arbitration. At a later point in time, the general assembly of the cooperative decided to adapt the wording of the arbitration clause so that it not only encompassed disputes arising out of the cooperative itself, but also those out of *"common banking transactions"* between the cooperative and its members. The claimant was a member of the cooperative who had joined well before the wording of the arbitration clause was altered, and never agreed to the change. He filed a lawsuit against the cooperative for damages from a credit transaction. The Austrian Supreme Court held that the claimant's declaration of entry might be interpreted as a submission to possible future modifications of the arbitration clause as far as disputes out of the cooperative are concerned. However, it could not be said that the claimant had agreed to the extension of the arbitration clause to disputes involvingindividual transactions between him and the cooperative.

OGH, Jul 26, 2000 docket no. 7 Ob 165/00s[51]) and **OGH, Jan 29, 2003, docket no. 7 Ob 310/02t**[52]), dealt with the effects of a settlement on an arbitration clause in the original contract. The Supreme Court held that unless provided for otherwise in the settlement agreement, a dispute arising out of such an agreement does not fall within the scope of the arbitration clause in the original contract to the extent the settlement excludes the recourse to the original agreement (novation).

E. Dissolution of the Contract

One of the key decisions the Supreme Court often refers to in its recent judgments[53]) is **OGH, Oct 9, 1929, docket no. 3 Ob 727/29**[54]). In this case, a company agreement contained an arbitration clause for disputes between the parties of the company agreement. One of the partners filed a lawsuit for damages against another partner based on the fact that the defendant had applied for, and been granted, a preliminary injunction securing a – according to the claimant – nonexisting claim out of the dissolution of the company. The Austrian Supreme Court held that, even though the company agreement was no longer in existence when the lawsuit was filed, the arbitration clause nonetheless applied, as it covered all disputes arising out of the company agreement, even if they occurred after its dissolution.

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[50]) RdW 2003/563.

[51]) JBl 2001, 179; ecolex 2001, 70.

[52]) RdW 2003/320.

[53]) Interestingly, the decision is sometimes cited as following the general principle of a wide interpretation of the arbitration clause. This is not entirely correct, as it only covers the effect of the dissolution of the contract on the applicability of the arbitration clause.

[54]) JBl 1930, 18.

This principle that the applicability of an arbitration clause in a contract remains intact even after the contract itself has been dissolved was affirmed in **OGH, Apr 18, 1985, docket no. 7 Ob 551/85 and 7 Ob 552/85**[55]). The arbitration clause in question was part of a framework agreement. According to the clause, the parties were obligated to try to resolve their disputes by negotiation, failing which, an *ad-hoc* arbitral tribunal was to decide on the matter. The dispute at hand resulted from a bill of exchange that had been given as payment for a delivery that took place in fulfillment of the frame contract. However, the original bill of exchange had been prolonged, so that when claimant filed a lawsuit for payment, he based his claim on a bill of exchange dated later than the expiration date of the frame contract containing the arbitration clause. The Austrian Supreme Court upheld the principle that the arbitration clause could remain applicable for as long as possible disputes out of the dissolved contract could arise.

In **OGH, Sept 6, 1990, docket no. 6 Ob 572/90**[56]), which looked at proceedings concerning the possible annulment of an arbitral award, the Supreme Court again confirmed this principle, however, not without adding another important aspect to it. A service contract between a builder and an architect contained the provision that an institutional arbitral tribunal was to decide on *disputes between the parties.* The builder unilaterally terminated the contract claiming that the architect's performance had been completely useless. Concerning the latter's claim, arising out of this dissolution of the contract, the Supreme Court repeated that an arbitration clause in a contract continues to exist even when the contract itself has ended and thus also covers disputes arising from the dissolution of the contract. However, in this decision, the Austrian Supreme Court emphasized that this only applied to the unilateral termination of the contract.

In a number of later decisions the Supreme Court upheld the general principle that arbitration agreements contained in a contract survive a unilateral termination of the contract and continue to cover disputes about the contract and it termination.[57])

By contrast, the consensual dissolution of the contract will end the applicability of an arbitration clause.[58]) In **OGH, Nov 25, 1975, docket no. 6 Ob 221/75,** the claimant worked as a sales representative for the defendant. Their contract included the provision that *all disputes out of the contract* were to be decided in *ad-hoc* arbitration. Later on, the parties mutually decided to terminate the contract without immediate effect. Three years later, the former sales representative filed a lawsuit for unpaid commissions. The Defendant argued that this was a matter that fell within the scope of the contract's arbitration clause. The Austrian Supreme Court held that an arbitration clause which is included in a contract is part of that

[55]) SZ 58/60.

[56]) ecolex 1991, 86 = RdW 1991, 327.

[57]) *See* OGH, Apr 17, 1996 docket no. 7 Ob 2097/96z; OGH, Aug 25, 1999 docket no. 3 Ob 348/97s; OGH, Apr 29, 2003 docket no. 1 Ob 22/03x; OGH, May 22, 2006, docket no. 10 Ob 3/06y; OGH, Feb 05, 2008 docket no. 10 Ob 120/07f.

[58]) Koller, *supra* note 10, at para. 3/262.

contract and – if not otherwise provided for – shares its legal fate. If the parties terminate the contract by mutual consent, the arbitration clause also expires. According to the Supreme Court, the submission to the arbitration clause in a contract can not be interpreted in such a way that the parties intend it to apply to disputes that arise long after the contract has ended, even if they result from the contract. The Court argued that even if the parties of a contract desire arbitration in order to guarantee the smooth functioning of their contractual relations without having to apply to public authorities, this may no longer be the case as soon as the contract ends[59]). This view has lately been – rightfully, in the authors' opinion – criticized by *Koller*[60]), who remarks that as opposed to the view of the Supreme Court, in many cases parties mutually ending contractual relationships in fact *do* intend that disputes out of the dissolution should be dealt with by arbitration.

V. Conclusion

Many disputes concerning the scope of the arbitration clause can be avoided by carefully drafting and – if necessary – amending arbitration clauses. For example, disputes relating to the scope of arbitration clauses with relation to later modifications and auxiliary agreements might be avoided by including express references to the original arbitration clauses in these later agreements. However, the overview of the case law also illustrates that even if there is no such reference, disputes may still be covered by the arbitration clause contained in the original agreement. While it is possible to derive certain guidelines from the case law, the determination of the scope of arbitration clauses remain difficult, in particular if the intention of the parties can not be established.

[59]) In OGH, Jun 28, 1977 docket no. 4 Ob 523/77 the Supreme Court came to the same result in a case where the parties terminated a contract partially by mutual agreement. The Supreme Court held that following the partial termination of the contract the arbitration agreement survives for obligations resulting from that part of the contract which has not been terminated.

[60]) Koller, *supra* note 10, at para. 3/262.