DOING BUSINESS IN AUSTRIA – some Legal Aspects as of October 2012

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THE LEGAL SYSTEM

Austria has a population of approximately 8,5 Million. The central location in Europe offers a big locational advantage. Several international companies have chosen Austria as basis for their activities in Central and Eastern Europe. The most important industry sectors in Austria are metal processing, engineering, food product and chemical production. It is a democratic

Federal Republic. The constitution goes back to the year 1920. Austria consists of 9 provinces and is member of the European Union since 1995. The currency is the EURO.

The principle that there is a general freedom to operate for everybody ("allgemeine Handlungsfreiheit"), combined with the long established system of freedom to do business ("Gewerbefreiheit") creates a climate that is business friendly. There is, of course, regulation, and the necessity to transform European Directives into national law increases the amount of regulation. Besides national law, every province has its own law in certain areas. Both, the national law and the federal state law, are influenced by directives and regulations from the European Union.

The Federal law is under civil law system, with codes in certain areas: the civil code, the code of commerce, the code of social matters and procedural codes. These codes, in their core, are relatively stable. Administrative law and tax law, especially, is subject to frequent changes.

The court system is divided in several branches:

Civil Branch:
The "Bezirksgerichte" (local courts) are acting as small claims court up to a value of EURO 10.000. The Landesgerichte (provincial courts) deal with bigger claims and as appellate bodies for the Bezirksgerichte. Only Vienna has its own separate Commercial Court. The provincial courts (in Vienna the commercial court) keeps the commercial register (Firmenbuch). The four Oberlandesgerichte (Superior Courts) existing in Austria have, in civil actions, only the function of an appellate court for factual or legal issues of the decisions of the Landesgerichte. The Vienna Supreme Court is the last instance and decides appeals.

Just as in other countries, Austria has labour and social courts, administrative and criminal courts. As a rule, all decisions are made by professional judges.

ESTABLISHMENT OF ENTERPRISES

In General

As a rule, the establishment of an enterprise is at the will of the entrepreneur. That has its foundation in the liberty to do business ("Gewerbefreiheit"), which dates back to 1857. Whoever starts a business has to notify the authorities, and the procedures for that depend on the nature of the business. There are businesses where a notification is sufficient. For others an authorization is required, but the granting of authorization is mandatory unless there are specific reasons to deny it. There is the "Gewerbeordnung" (Business Code) that forms the legal core of this system, but there are plenty of specific laws for certain types of business.

For some of the business enterprises, there is an obligation to start insolvency procedures in certain situations of a financial crisis. This is established by the Austrian Insolvency Act (Insolvenzordnung). The motion must be filed in case of insolvency or over-indebtedness. There are important rules to comply with when running a business, e.g. to have orderly business records and keep books up to date.

Austrian law provides several vehicles to do business.

The simplest is to act as a sole proprietor. If a foreign corporation wants to do business, the simplest way would be a mere branch office of such corporation, which is, as a rule, perfectly possible. After some well known decisions of the European Court of Justice, it is now a possibility to use types of foreign corporations in Austria even if they have no business elsewhere (e.g. a British Ltd), but acceptance in the market is mixed and some legal framework is not yet completely clear. The classical way is to use companies where the models are contained in the Austrian law. There are two types of companies: the so-called companies of persons (Personengesellschaft) and the companies relying on a defined paid in capital (Kapitalgesellschaften). The latter is treated as a legal entity (which has as a consequence that shareholders are not liable for obligations of the company). The second consequence is that these companies as separate entities are taxed for their business. The companies of persons are taxed on the level of the shareholders owning them, but with the respective amount of profit as established on the level of the company.

For those personal companies, there are two types available: the General commercial partnership (“Offene Gesellschaft”), in which each member is liable for all obligations of the company, and the Limited commercial partnership (“Kommanditgesellschaft”), in which there has to be one partner liable for all obligations (the “Komplementär”), while all other members (Kommanditisten) have a defined cap on their liability, and if they pay in this defined amount, their liability is settled with such payment. The limited partners generally have no power of management or representation. It is very often the case that the personally liable partner is a corporation, i.e. a GmbH. This form is called “GmbH & Co. KG”. In this form there is no natural person who is unlimitedly liable. All Austrian business companies are registered in a public commercial register (Firmenbuch) that is held at local courts. In this register, you can find the basics of each company. This register is accessible for registered users online.

The Limited Liability Company (“Gesellschaft mit beschränkter Haftung” or „GmbH“).

This is the most common Austrian „Kapitalgesellschaft“, and has been established for a long time as standard legal entity for doing business. The rules for that company are found in a specific law, the law about GmbHs (GmbH-Gesetz). Not all rules contained therein are mandatory. Some only apply if not stipulated differently among the shareholders. The basic concept is that this company has a fixed share capital to be paid in by shareholders, which are not personally liable for the obligations of the company.

A purchase or the founding of a new company requires a notarial deed, and so does each transfer of shares. If founded, bylaws must be created which are the governing rules for shareholders and management. One shareholder is sufficient to establish the company. The nominal capital required is 37.000 EURO. 50 % of this amount must be paid in immediately. Each share has to amount to at least 70 EURO. The company comes into existence when first registered in the corporate register. The application for the performing of the entry has to be signed by all shareholders. The company is legally represented by its managing director. In front of the managing director, it is represented by the shareholders. It can have several managing directors. The managing director does not have to be a citizen or resident of Aus-

tria. The managing directors have to follow orders given by the shareholders, unless such orders would violate mandatory law. Shareholders may, in bylaws or otherwise, establish a list of acts for which management needs to have prior approval of the shareholders. The laws for a GmbH allow for flexibility, as a lot of regulations in the law are not mandatory.

The concept of having a nominal capital is a guiding principle for a GmbH. During the existence of the GmbH, the capital may not be returned to the shareholders, and non-compliance that creates a personal liability for the management. This has some implications in cash pooling arrangements, where it must be secured that if money is paid out at least a corresponding claim of value exists against the shareholder.

The Stock Corporation ("Aktiengesellschaft" or "AG")

The Stock Corporation is designed for bigger enterprises. It also has to have a minimal capital, which is 70.000 EURO. The rules for the AG can be found in the law about stock corporations ("Aktiengesetz"). Most of these rules, in contrast to the GmbH, are mandatory, thereby allowing for hardly any flexibility. Shares in the AG can easily be transferred. The AG therefore is the entity common for listed companies. For listed companies, additional rules apply. The AG must be registered in the commercial register (Firmenbuch) and can be founded by one or more natural or legal persons. If there is a single shareholder, his name must be listed in the commercial register. The AG is run by its management board ("Vorstand"). In contrast to the GmbH, there is no legal power for the shareholders or the supervisory board to issue instructions to the management board. There are several types of shares, and no certificates are necessary.

(a) Shareholders meeting (Hauptversammlung).

The Shareholders' meetings are the event where the shareholders may execute their rights, mainly by voting. It is also possible for shareholders to pass written resolutions. (§ 126 AktG); but voting is not possible by circulation.

The Shareholders' meeting may vote on:

- the composition of the advisory board
- the use of yearly results
- discharge for supervisory board
- the appointment of the auditors
- changes in the bylaws
- increase or decrease of the nominal capital
- initiation of probes for special matters
- the dissolution of the corporation
- matters of management, if demanded by the managing board

The shareholders meeting is called in by the management board with a notice period of 28 days, with some formalities to be obeyed. In the shareholders meeting, a shareholder is entitled to receive answers from the management board on questions he asks to topics on the agenda.

(b) the Managing Board (Vorstand)

The Managing Board (it may also be only one person) is running the company and legally represents it. Towards the Managing Board the company is however represented by the supervisory board. The members of the Managing Board are appointed and removed by the supervisory board (Aufsichtsrat). An appointment may not exceed five years. Removal requires important reasons. There is a non-compete obligation mandatory for the members of the managing board. There is also by law a liability for members of the managing board should they violate legal obligations for their duties.

(c) the Supervisory Board (Aufsichtsrat)

In contrast to the GmbH, an AG is obliged to have a Supervisory board. The Supervisory board is the body by which some control is executed over the Managing Board, which has the obligation to regularly give reports to the Supervisory Board. The Supervisory Board may look into the books and records of the corporation. It's most important task is to appoint and dismiss the member of the Management Board, set their salaries and negotiate their service contracts. The Supervisory Board is elected (and can be dismissed) by the shareholders meeting, has at least three members and at most 20 members. The bylaw of the company has to define the number**.** A member of the Management Board is prevented from being a member of the Supervisory Board. The term of the Supervisory Board is defined in the bylaws, but may not exceed five years.

DISTRIBUTION ARRANGEMENTS

Manufacturers often use distribution or agency arrangements to sell their goods in Austria. Typically the companies confer the risks and costs for their own distribution by distribution agreements upon commercial agents or distributors.

Commercial Agent (Handelsvertreter)

According to § 1 Austrian Commercial Agent Code ("Handelsvertretergesetz"), a commercial agent is one who, as an independent person in business, is regularly entrusted with solicitation in business for another (the Principal) or with conclusion of business in his name. He acts in the name and for the account of a third party and receives provision based payments by the Principal for his activities. Unlike the distributor, the commercial agent does not purchase products, but acts as a mediator between seller and customer. The commercial agent usually acts independently on behalf of one or several specific companies. In this way he is different to a distributor, who acts in his own name and account, or a commissioner, who also acts for the account of a third party but in his own name. The commercial agent may be entitled to sign agreements in the name of a company, but only, if agreed so between agent and principal. A written agreement with the Principal for acting is not required, but useful as documentation.

Rights and duties

The commercial agent has an obligation to make efforts towards the solicitation or conclusion of business, must act in the interest of the Principal and shall provide the Principal with all necessary information. Based on the duty of loyalty, the commercial agent is not entitled to act for a competing company in the Principal's branch of business. Exceptions are only possible with Principal's approval. However, as ruled in § 25 HVertG, a post-contractual non-competition clause is unvalid.

The Principal generally may still directly distribute his goods, but the Principal has to consider the interests of the commercial agent. In case of a customer protection or territorial protection clause a restraint of competition is assumed.

The commercial agent must register at the trade office (Gewerbeamt) prior to beginning his commercial activities.

Commission

Commercial agents are usually paid in performance-related commissions, only payable once the represented Principal concluded the referred business. Commissions are due for business, which can be attributed to the commercial agent's activities. This also includes follow-up orders by customers previously solicited for the Principal. The local agent, if he has been assigned with a certain region or clientele, may also claim commissions for deals concluded by the Principal within the assigned region or clientele, in which he did not take any part. The commission amount is to be fixed in the contract and can vary according to branch and product.

Compensatory claim

After termination of the commercial agent relationship, the agent is entitled to claim a one-time compensation for the customer base he has developed or intensified for the Principal. This compensation claim is set by law and can neither be excluded by the contracting parties before signing the agreement nor be limited in divergence from the law. Negotiations regarding the amount and payment of the compensation are however possible upon termination of the agreement. The claim is to be asserted within one year after termination of the agreement. Should the commercial agent himself have terminated the agreement, then a compensatory claim does not arise, excepted if the termination is due to the Principal's behaviour or if the agent's age or health does not allow him to continue his activities. Should the Principal terminate the agreement for severe cause, then the compensatory claim is inapplicable.

The compensation amount is calculated according to the benefits the Principal still has and equity criteria. Equity criteria might include the agent's commission deficits. It is to be determined, which commissions were obtained by the agent through deals with new customers made by him or intensified old customer relations during the last contractual year and for how many years he would presumably have been able to keep those commercial relationships. However, compensation may amount to no more than the annual average commission over the last five years of the activity of the commercial agent, if not otherwise agreed between the parties.

Tax considerations

The involvement of a commercial agent might be considered as a permanent establishment of a branch in Austria, if the commercial agent is entitled to conclude deals for the Principal (power to contract) and not only for their procurement. Should a permanent establishment exist, the foreign company has to comply with income tax regulations in Austria.

Distributor (Vertragshändler)

Unlike the commercial agent, the distributor himself purchases the Principal's products and resells them in his own name and for his own account to a customer. The advantage of this method for the Principal is that he already receives the purchase price for the product before it being sold to a customer. On the other hand, this system prevents direct legal relations between the Principal and the customer, so that the risk of bankruptcy of the final customer as well as all commercial developments lies with the distributor.

If the principal wants to receive information about customers (or needs it for practical or legal reasons) this must be stipulated by contract.

The distributor is often assigned a protected area. In order to protect the distributor's position, the Principal may take responsibility not to appoint any other distributors in this area and not to distribute his products in the area himself or through a third party. Should the Principal breach a respective stipulation, he is to be held liable for damages. The distributor can then claim compensation for lost profit.

The distributor does usually not get commissions. Exceptions are however possible.
The distributor's bankruptcy is cause for dismissal.

Unlike the commercial agent, the distributor cannot claim from the Principal a compensation after expiration of the contractual relationship. The only exception is, if the distributor had been closely tied in the sales organisation and is contractually obligated to forward his clientele to the Principal upon termination. In this case the distributor is entitled to claim compensation upon termination for his clientele like a commercial agent. Further requirements for a compensatory claim would be that the Principal will benefit from these customer relations even after termination of the contract with the distributor and that the distributor will suffer losses due to this termination.

ACQUISITION OF REALTY

If you want to require real estate in Austria as a foreigner, including foreign corporations, with the exception of EEC-member states and Switzerland, in some Austrian provinces, you need an official permit in accordance with the law on the purchase of immovable property by foreign nationals. The acquisition always requires a notarial deed and is divided in two contracts due to the principle of abstraction, one creating the mutual obligation to transfer the land, the other executing the transfer of land. The notarized form is due to the acquisition of reality being considered as important business and the notary is under an obligation to render neutral advice to all parties to protect them and make them aware of risks. He also does prior

research in the land register, assumes correspondence with tax and other authorities and, on demand, acts as escrow agent for the moneys transferred.

There is a land register administered by the local courts. It shows the size, location and owner of a piece of land, some contractual entanglements of the land (not necessarily all – e.g. simple leases are not shown), mortgages or other pledges. Regardless of whether one is the owner of the respective property, anybody can access the land register without having to state reasons. As there might be a time gap between the contractual obligation to the transfer of ownership and its execution, the acquirer should agree with the seller to a note in the register ("Auflassungsvormerkung") that blocks the transfer of the land to a third party.

If land is acquired for industrial purposes and has served for such purposes already in the past, it is advisable to receive a set of warranties that there are no environmental hazards or even demand some proof for it, as with the ownership of land also the responsibility for such hazards could become a problem of the new owner.

Also, it is always advisable to verify the status of the land. Local zoning laws shall determine the permitted use, and for building and destructions permits are needed.

The transfer of ownership in land is subject to a transfer tax which is 3,5 % of the value of the consideration for the transfer. The tax does not require that the ownership actually changes for the land. It does also apply if the land belongs to a company and the ownership of such company is transferred. Also, there is a yearly municipal tax for the owner of the land. The entering of the new owner in the official real estate register causes the levying of an official court fee of one percent of the base of assessment of the property acquisition taxes.

However, there are several legal instruments that create the possibility to use realty, some legally weaker, some stronger.

The simplest way is the lease. The lease is normally either for an undefined period with the possibility to terminate it in defined notice periods. Or it has a set term with the possibility to prolong it. A change in the ownership of the property does not affect the validity of the lease, which just by law changes the contractual partner. Leases are not registered in the land register.

You can have, by agreement, a specific right to use the property to be registered in the land register (Grundbuch), and certain types of use, e.g. the right to erect buildings (Baurecht), are subject to a set of regulations in the civil code. Such rights normally have a longer life span (at least 10 years, maximum 100 years).

TAXATION

Taxation of Businesses takes place on several levels. Taxation in Austria as in other countries is based on a complicated and ever changing set of rules. Below, only the most important taxes are listed.

(a) Capital duty

With the foundation, a onetime capital duty (share capital tax) of 1% of the paid in nominal capital is payable. The increase of the share capital is also subject to a 1% capital duty.

(b) Corporate tax

The corporate tax ("Körperschaftsteuer") is the income tax of the corporation. The corporate tax is based on the annual profit of the corporation as derived from the trade balance sheet and corrected to some extent for tax purposes. The tax rate is 25 % thereof. Taxed is the corporation. Fully tax-liable GmbHs have to pay regardless of their profit an annual minimum tax of EUR 1.750 and an AG EUR 3.500. Only in the first year of existence, a lower rate of taxation does occur.

(c) Business tax / Municipal tax

A business tax ("Gewerbesteuer") is no longer payable in Austria since 01.01.1994. Instead, every entrepreneur, who hires staff within the country, has to pay a local tax, which amounts to 3% of the gross salary.

(d) Value Added Tax

The Value Added Tax ("Umsatzsteuer") is a tax that is imposed on the revenues that a business generates within Austria. Deducted from this tax base is the so-called pre tax (Vorsteuer) contained in invoices of third parties for deliveries or services to the business. The standard tax rate is 20 % of the revenues, with a reduced rate for some goods or services of 10%.

(e) taxation of dividends

The dividends that are the result of an investment that belongs to business assets are taxed when such dividends are distributed. Dividends to the shareholders are subject to a taxation of 25 %. If the shareholder is a natural person, the final taxation comes into effect, e.g. the shareholder does not have to pay any more income taxes. If the owner of the distributing entity is a domestic corporation, then dividends are not taxed. If the shareholder is a foreign corporation based in a EU member state, who is comparable to a domestic corporation, the capital income tax is also stopped, if the participation during a continuous period of at least one year is of at least 10% (§ 94 Z 2 EStG). Austria has concluded double taxation agreements with a lot of countries. These contracts foresee a reduction of Austria`s withholding tax.

(f) capital gains tax

The dividends paid out by a company to its shareholders are subject to a withholding tax of 25%. If the capital gain is realized by a corporation, the gain is not taxed. For natural persons who are tax liable in Austria, this satisfies the need to pay taxes on this income. No further encumbrances ensue (final taxation).

(g) Fees and Duties Act

There is a special law in Austria called “Gebührengesetz”. According to this Austrian Fees and Duties Act, legal transactions are liable to fees, if a written conclusion of an agreement exists and if this kind of legal transaction is mentioned in the Fees and Duties Act.

Especially the following legal transactions are subject to this law:

- lease agreement
- rental agreement
- extrajudicial settlement
- assignment of a claim
- trade mark or patent application

The duty for real estate rental agreements amounts to 1% of the assessment basis. In case of rental and lease agreements for an indefinite time, the assessment basis here amounts to the triple of the annual percentage rate.

For an extrajudicial settlement the duty amounts to 2% of the total value. If the settlement concerns a law suit already pending with a court, the fee amounts to 1%. For an assignment of a claim, the duty is 0,8% and for each trade mark or patent application EUR 50,--.

The dutiable transaction has to be indicated and the duty has to be usually paid to the tax office until the 15th of the following second month after conclusion of the contract.

CUSTOMS REGULATION

There are no customs within the European Union, and after the Schengen Agreement, even controls have been abolished at the borders of member states to other member states. The customs and tariffs remaining are monitored by the European Commission in their “Tariff Code”, which dates back to 1993. There is now an amended code since 2008, which has not been implemented but will be so no later than 2013. The European Union concluded several trade agreements with other countries to ease the trading with goods and services.

Additional import and export regulations are, however, still in place in national law within the regulation for the execution of the foreign economy law (Foreign trade and payments act and regulations on foreign trade). There are detailed sections, which imports or exports are subject to approval or are simply forbidden or where reporting to the authorities is required.

CURRENCY REGULATION, CAPITAL AND PROFIT TRANSFER, INVESTMENT INCENTIVES

The principles for those regulations are contained in the Outside Economy Law (Foreign trade and payment act, formerly foreign trades act). This law has lost a lot of its importance as the members of the common market of the European Union are no longer considered as “outside” and the economic foreign policy is now a matter of the European Union. Obviously,

the members of the EURO zone will also not have any currency regulations of their own. Beyond that, the principal is that capital and profit transfers are free after they have been taxed. However, there are obligations to notify authorities about transactions.

There is a big set of Investment Incentives and subsidies in place. For subsidies, the legal foundation is spread throughout a lot of special laws. Subsidies are also based on EU law. All that is subject to frequent change. Special research is recommended for each project. The Austrian Economic Chamber and banks offer assistance and there are specialist consultants for these matters. As subsidies, there may be grants and loans or guarantees. The general rule is that applications must be made before the investment concerned is made. For subsidies, conditions apply regularly for their use and the investment subsidized remaining on its location.

COMPETITION LAW

There is a specific law against unfair competition (Gesetz gegen den unlauteren Wettbewerb), which tries to word general rules of what is fair or unfair among competitors, but mainly is interpreted by a huge set of jurisdiction. The structural part of competition law is contained in another law, the law against cartels and other reductions of competition (Bundesgesetz gegen Kartelle und andere Wettbewerbsbeschränkungen), which deals with merger control for antitrust purposes, with the prohibition of cartels and the conduct of companies that are predominant in a market. This law is a product of a tradition that has been started only after the Second World War. There have been major changes in the law since, mainly to adapt it to the respective legal system of European law.

The law starts with a general rule that agreement by or behaviour of enterprises with the purpose to prevent, impediment or falsify competition are not permitted. It states some exceptions with a referral to EU “Freistellungsverordnungen” that expressly permit and exempt typified agreements and certain agreements between small- and middle-sized enterprises. As this is thereby forbidden by law, this means that Agreements are void, if they are in violation of the law.

A section deals with the conduct of predominant companies in a market. Such companies may not abuse their position. It defines a predominant position as one if, when offering or requesting services or goods on a market, there is no or no significant competition or if the position of an enterprise in such market is overwhelmingly strong. A predominant position is assumed if the market share is at least 30%. The law also gives examples of the most significant conduct considered to be abusive. Examples are: to diminish without a factual justification the possibilities to compete for a competitor in the market if that affects the market; behaviour in pricing or in the application of terms and conditions, the refusals to share infrastructure if such share is necessary to let others enter the market, discriminatory practices, also in front of dependent enterprises (not only competitors) and boycotts.

Also, there is a referral that violations of Art. 81 and Art 82 of the EU treaty are also violations of this law. If there are violations, the cartel court receives permission to act and may also impose preliminary injunctions. It can confiscate relevant profits. Also, competitors that have been violated get a claim to force the violator to refrain from the violation and the claim to

demand damages. The “Oberlandesgericht Wien” is the cartel court and competent for the whole country. The appellate court for decisions of the cartel court is the „Oberste Gerichtshof“. The State Cartel Lawyer (“Bundeskartellanwalt”) represents the public interest.

The law also regulates merger control. A merger is if an enterprise acquires the whole or a substantial part of the assets of another enterprise, or the acquisition of the direct or indirect control about another enterprise – control being a determining influence by fact or law or both. It is always considered as a merger, if 50 % of the shares of an enterprise come under control by an acquisition, or 25 % of the capital or the voting rights.

The control takes place only upon a minimal value of the merger: globally, more than 300 Mio EURO, in Austria more than 30 Million EURO and at least two companies worldwide reach more than 5 Million EURO sales revenues. The defining period is the last business year before the merger.

The law, however, does not apply if only one of the affiliated companies has had in its last business year pre-merger more than 5 Million Euro in Austria and the others together not more than 30 Million Euro worldwide.

The criteria to forbid a merger: the merger must not create or strengthen a predominant position, unless reasonable proof can be established that it also improves the conditions for competition that outweigh the disadvantages. If a participating company is an affiliate within a group, the above rationale for forbidding shall count the whole group as one enterprise.

The Austrian Cartel Office (“Bundeswettbewerbsbehörde”) has to be notified of mergers for which the law is applicable. Also the completion of a merger has to be notified and such completion is forbidden (unless the merger has been cleared already) for the time frame the cartel Office has for their procedure according to the law. The procedures are indicated below. The cartel office can waive the obligation not to complete.

One month after having received the complete notification (there is a set of information defined in the law for completeness); the office has to alert the applying enterprise that it has started the main probe process in the procedure. Failure to do so means that the merger can no longer be forbidden. The office has to forward its decision to the applying enterprise within five months after reception of a complete notification. If no decision is forwarded, the merger is deemed to be approved. The decision to permit a merger may have conditions attached or may impose certain acts to be fulfilled, but may not imply a permanent control of behaviour.

INTELLECTUAL PROPERTY

Austria has a long tradition in the law and the protection of Intellectual Property. It offers several types of protection, depending on its subject.

Patent Protection

The patent law is twofold. There is the traditional national system that gives national and only national protection for inventions. The protection is for a period of 20 years, starting from the

date of filing. The filing for a patent can be effected by a corporation, and it must name its inventor, but a corporation cannot be an inventor. If the filing party does not have an office in Austria, he must be represented by a patent attorney or lawyer. Patents can be transferred by simple agreement; however, it is advisable to have such a transfer registered in the patent register of the national patent office in Vienna, which handles the filing and granting of patent, the revoking of a patent and is cashing in on the annual fees.

The other route to take is a filing at the European patent authority, whose offices are in Munich, Germany. The protection is not really different, as legally, a European patent will denominate countries for which the protection is claimed and, when such protection is ultimately granted, it legally adds up to a bundle of the respective national patents, giving protection according to the respective national law with the possibility to have different fates. A patent gives a claim against a violator of ceding the violation and damages.

The basic requirements to get a patent are: the invention must be new, it must be the result of an inventive activity and a use in business must be possible. There are explanations and examples in the law: important is the principle exclusion of software and some biological matters for ethical reasons. On demand, the Patent Office verifies if the requirements are met.

Important for employers: the Austrian Patent law also includes rules about the inventions of employees made in the context of their professional work, and a big percentage of inventions are of this type. Such inventions become not the property of the employer by default. For this, a written agreement between employer and employee is required. If an agreement exists, according to which future inventions of the employee belong to the employer, the employee must immediately report such inventions to the employer. The employer then has to notify the employee within four months, if he wishes to use the invention or not based on the existing agreement. Should he claim the invention, he must pay a reasonable fee for the invention (mostly a percentage of revenues therefrom). Should he not claim the invention, it remains with the employee.

Claims concerning patent infringements have to be made solely in front of the commercial court in Vienna (Handelsgericht Wien).

Copyright Protection

This is the second big core of intellectual property protection, the one with ever increasing importance. In the past, “copyright” was considered a matter mainly for the arts, but the lately with the raise of computer software, which is subject to copyright protection (and only in rare cases to patent protection), that has changed. Like most continental European systems, the copyright is not tied to the work but to the life span of the author, to survive this span for a period that is now 70 years. The protection is not gained by any formal procedure or registration but by the mere creation of what has the quality of a “work”, a creation somehow related to the personality of its creator. It is important to know that copyright, in the legal theory, cannot be completely transferred by contract, but only in the case of a universal succession, as to an heir. What can be transferred, though, is the non-exclusive or exclusive right to use a “work” in this or that way.

An important thing to know is that, in a question of doubt, the copyright has the tendency to remain with its owner. So when drafting a licence agreement, it is advisable to be specific for the types of usage that are permitted. If you want to have the rights of usage in a way not yet known, such transfers must be made in writing.

Violations are subject to suits in front of the commercial committees at the provincial courts or at the commercial court in Vienna.

Trademarks

The trademark system, like the patent system, is also twofold. There is still the national Austrian law on trademarks which describes the type of protection and the filing procedure. The registration is handled at the Austrian Patent office in Vienna. It has lost ground, however, to the trademark that has validity in all 27 EU countries and is, with the same range of protection, handled by the European Union Trademark office in Alicante, Spain, since 1996.

Protection is for commercial enterprises for trademarks that must have the power to be distinguished and go beyond mere descriptions. Protection may be acquired for pictures, words, a combination of both, to be attached to goods or services. Trademarks may be transferred, and they can be voided on demand of third parties if they remain unused for five years. They may not be used identically by third parties without a licence, but also the use of trademarks that may be confused with others that have older protection may be forbidden by the owner.

The protection is for 10 years; it can be renewed for several terms of additional ten years.

Small coin

There are also two additional systems that have some importance, but inferior to all above. There is the so-called “Gebrauchsmuster” (Registered Design), which is for technical inventions, which needs only a less inventive level and is registered with only formal examination at the Austrian Patent Office. It is therefore easier to void compared to a patent.

Further, there is a design related intellectual property right called “Geschmacksmuster”, which is considered to be the small coin of the copyright. It requires a specific design that is unique and distinguishable from other designs. It may get protection for 25 years, and the registration takes place at the Austrian Patent Office in Vienna. Since 2002, there is also a European Union procedure for community wide protection, which is handled by the European trademark Office in Alicante.

Know How

All the above, with the exception of the copyright, describe protection that is granted in a formal way with at least some abstract description of the subject of such protection. Such protection is lacking for a matter commercially of huge importance: the know how. In itself, know how is unprotected; the protection therefore is to keep it secret. Business Secrets are protected by criminal law from theft.

EMPLOYMENT LAW

A unified codification of the Austrian labour law does not exist. Statutory requirements are spread over many single Acts influenced by a diversified and strong jurisdiction. The Austrian labour law is Case-Law divided into *individual labour* law regarding the relationship between employer and employee and *collective labour law* regarding the relationship between the employer / employers' associations and the works council / trade unions.

False Self-Employment

Employment is activity for a third party depending on directives. The differentiation from independent contracting is sometimes difficult. Whether a freelance activity or an employment exists is to be determined by a detailed examination on the extent of dependency on instructions, directives and integration into the organization. A freelancer shall be free to choose whether, where, when and how he carries out the work he was hired for. In order to avoid serious consequences of a false self-employment (payment of accrued social security contributions and eventual criminal offense for withholding of social insurance contributions), in case of doubt a clearing procedure with the social security administration should be initiated.

Individual Labour Law

The employer is to refrain from any discrimination when advertising positions, during the interviews and the applicants' selection. This includes a gender neutral job advertisement as well as any non-discrimination on the grounds of race or ethnic origin, gender, religion or belief, disability, age or sexual orientation.

Though employment contracts may be verbally agreed, a written form is recommended. The employment commences not later than the moment when work is resumed. It is possible to limit the employment. The agreement of an additional limited employment immediately or shortly following another limited employment, the consecutive agreement of a fixed-term employment contract must be factually justified on special economic or social grounds. A probation period may be agreed on up to one month. Within this period, a termination is possible without justification and without any notice period.

A week generally amounts between 38 and 42 work hours. A part-time-agreement is possible without particularities. For at least 25 working days per year paid leave is to be granted. Should the employee be absent due to illness, the remuneration is to be paid for an absence of up to 6 weeks for the same illness.

Termination

A termination does not require a specific form, unless agreed otherwise in the employment contract. The written form is however recommended for reasons of proof. According to Austrian employees act (Angestelltengesetz), the termination notice period for the employer is 6 weeks within the first 2 years of the employment, afterwards 4 weeks up to 5 months, depending on the duration of the employment at the moment of dismissal. If nothing was agreed in the employment contract or collective agreement regarding the termination notice period, the end of the respective calendar quarter shall apply. It is however not possible to fix

the fifteenth or last day of a calendar month as cancellation note in the employment or collective agreement.

Dismissal on behalf of the employee can be given with a period of one month. These are minimum periods that can be extended by contract. It is usually agreed that the employee has to adhere to the same period as the employer. The right to an instant dismissal for good cause is not affected by this. In this case the termination must take place immediately after the party entitled to terminate learned of the circumstances justifying the termination.

Stating a reason for termination is not required at the moment of the notice of termination. If the company has more than 5 employees, the employee can proof the validity of the termination by the labour and social court (for example for social hardship or an invalid motivation for termination). The action for annulment must be filed within 2 weeks after reception of the notice of termination. In case of legal proceedings, the employer must justify and prove his reasons for termination.

If the employment lasted continuously for three years, the employee is entitled to a compensation, which amounts to double of the salary received in the last month of the employment, triple if the employment lasted five years or with a longer employment to up to the twelvefold of the monthly salary. The claim for compensation is not valid, if the employee terminates the employment or if a misconduct lead to the early dismissal.

Furthermore, the employee is entitled to a compensation, collected in the employee provision fund. The employer had to pay monthly 1,53% of the gross salary during the employment (Abfertigung Neu). Instead of a pay-out, the employee can decide that the collected sum will be reinvested in the provision fund. A pay-out is not possible if the employee terminated the employment or caused the dismissal.

Dismissal due to misconduct

A cause for behaviour-based dismissal is given, if the employee repeatedly breaches his contractual duties. Such dismissal however as a rule, should be preceded by a qualified warning.

Dismissal due to operational requirements

Should the cause for dismissal lie with an operation restructuring or rationalisation, then the employee can be dismissed if his position is cut and after the employer has carried out a social selection. Social selection compares eligible employees based on the criteria length of employment, age, number of dependents and severe disability.

Special Protection against Dismissal

One must also keep in mind, that in addition to the above mentioned special protections exist in case of maternity, parental leave, for persons with disabilities, works council members and other officers under the Works Constitution Act (“Arbeitsverfassungsgesetz”). In these cases, additional approvals by certain bodies are required, which must be obtained prior to giving notice. In order to avoid risks of legal proceedings it might be convenient to agree on a time

limit at the moment of the contract's signature or to mutually agree on a resignation or termination agreement. The latter might however lead to a postponement or cutback of unemployment benefits for the employee.

If the employee files his claim within the given terms, the competent labour court will examine the causes leading to the dismissal. Should the court come to the conclusion that the termination was invalid; the employment will be reinstated with retrospective effect. This implies for the employer that wages are payable in arrears.

Collective Labour Law / Codetermination Rights

With the exception of certain branches, for which binding collective agreements apply, collective agreements only apply, when employer and employee are members of the respective organizations or the applicability of a collective agreement has been contractually agreed. The existence of a works council on an operational level is common. Such a council can be elected already if an enterprise has 5 employees. The council holds extensive and differently strong codetermination rights. Essential parts are rights of approval with the hiring of new staff members or relocation, regarding social matters as introduction/order of overtime, compensation systems, new software, etc. These important determination rights lead to the necessity of obtaining the consent prior to any changes.

In case of dismissal the council also has to be informed and consulted in advance but at the end cannot prevent dismissal. However, failure to consult makes a dismissal invalid. Only in cases of economic matters of operational changes the council might negotiate a reconciliation of interests and a social plan pursuant to the regulations of the Works Constitution Act ("Arbeitsverfassungsgesetz"). Especially cutback, shutdown or relocation of works (or parts thereof), split up or amalgamation are subject to strong determination rights. While the council cannot prevent the operational changes, it is advisable to seriously negotiate an agreement with the works council, as otherwise an arbitration body composed of employers and employees' representatives with a neutral chairperson may render a binding decision.

Social Insurance

The employer is obliged to duly pay in social contributions and income taxes for the employee. Social security contributions (worker 21,7% and employee 21,83% of the gross amount; status of 2012): this includes health, accident, pension and unemployment insurance, the contribution for the Insolvency Remuneration Fund, the chamber of labour levy, and the contribution to the family assistance fund , communal taxes (up to 3% of the gross salary), contribution for the employee provision fund (1,53% of the gross salary "Abfertigung Neu"), contribution to the family equalization fund (4,5% of the gross salary) and the employer-contribution surcharge (between 0,36% and 0,44%)

Therefore in addition to the calculated gross salary the employer has to add about 30% for his calculation of total employment costs. In addition to that contributions for the employers' liability insurance are to be borne by the employer depending on the type of activity of the employee.

Residing and Working in Austria

Before sending foreign employees to Austria it is necessary to get familiar with the visa, resident and work permit regulations issued by the local foreigners' registration office.

For members of European Union countries the right to reside is unlimited. Work permit is not needed, though there is a seven-year transition period for the countries that joined the EU in 2004 and 2007. If an employee comes from a non-EU country, a work permit is needed, and might be difficult to get depending on the skills of the employee as immigration laws are intended to make Austria attractive only to highly qualified personnel.

If the conditions for a residence permit exist, but these do not allow for an occupation as an employee, an additional work permit is required. The work permit is limited to a specific employment at a specific place and is restricted to maximum one year from the date of its issue. The work permit must be applied for by the employer at the local office of the Austrian Labour Market Service.

BANKING LAWS

On January 1st, 1994, the Austrian Banking Act ("Bankwesengesetz") came into force and replaced the previous Banking Act (Kreditwesengesetz 1979). It is the centerpiece of the financial market adaptation act of 1993, which gave a new order to the Austrian financial market. It is the most important regulation for the banking industry. One of the legislator's goals was to guarantee the EU-compliance of the Austrian banking laws. All professional banking business requires an authorization by the financial market supervision ("Finanzmarktaufsicht"). Next to the Austrian Banking Act, there are a number of other regulations in relation with the banking business and whose compliance is supervised by the financial market supervision and the Austrian National Bank.

Of course, there are a lot of loan types, and the legal basis of all is the contract about a "loan" as covered in the civil code Sec. 983 ff. For lines of credit, you may find a legal basis in the section about the Kontokorrent ("current account") as in the commercial code, sec. 355. The interest for a loan can be freely negotiated, but there is a limit to its height. If it is against the ordre public or good mores, the agreement on it is void. That is the case if the interest rate is remarkable higher than the usual market rate or if the effort is more than 50% less valuable than the promised consideration.

In the beginning of a banking relationship, it will be hard to obtain loans. There will also be a higher need for a collateral. In case of a newly established company, the first demand of the bank most likely will be a guarantee from the shareholder. Other customary collateral might be the transfer (for security purposes) of the title of ownership in goods, if a loan is used to acquire goods. There may be pledges on real estate; also it is possible that receivables are assigned to the bank. About this collateral, there will be agreements with the bank. The bank will observe the rules and avoid to receive too much collateral. If that happens nevertheless, the agreement might be void. If along the road the collateral, compared to the risk, has become too valuable, there is, independently from any contractual agreements, a claim to free collateral no longer required.

Very customary is also the use of the so-called “Lastschriften”, by which a third party is allowed to draw funds from an account. If that has been agreed it is the burden of the recipient to actually use it. This system has been established by agreement among the banks. Most important is the right of the account owner to call back the funds withdrawn by a third party within six weeks. Cheques, for which an old specific law exists (“Scheckgesetz”), are still used but have come out of fashion.

The financial crisis has put a specific importance on the obligation a bank has in relation to the sale of investment products to their customers. This implies also a contractual relationship, and some obligations are spelled out in the law about the supervision of securities (“Wertpapieraufsichtsgesetz”). There are obligations to disclose certain matters (e.g. if a bank gets commissions), and obligations to give advice on the planned investment. That includes the verification of the personal situation of the customer. Failure to comply with these and other obligation will entitle the customer to damages.

If you deposit funds in a bank, there is a certain security for those funds in case that the bank should fail. As some foreign banks are not necessarily members of the system bank organizations have established, it is advisable to check the securities in place on a case by case basis.