# fifteen

The Binder Grösswang Magazine

July 2016

## ADVOCACY

# 15


| | | |
|---|---|---|
| 3 | Editorial | |
| 4 | Cover Story | *Justice for Courts of Arbitration* |
| 10 | Spotlight | *The Binder Grösswang Dispute Resolution Team* |
| 12 | Focus | *Class Actions* |
| 13 | Opinions | *Harald Schiffl / Rosemarie Schön* |
| 14 | Up To Date | *Supreme Court on Vertical Restraints* |
| 15 | Background | *Rights Protection Mechanisms and New GTLDS* |
| 16 | Topic | *Dawn of a New Era in EU-Iran Relations?* |
| 17 | Up To Date | *Deals* |
| 18 | Competence | *Business Clippings* |
| 20 | Invitations | *Binder Grösswang impulse* |
| 22 | Others About Us | *Reputation* |
| 23 | Career Moves | *Welcome Aboard* |


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## ABOUT ADVOCACY

How do we serve our clients? When rendering legal advice we tell our clients about the relevant legal framework so that they know what decisions to take to remain within the boundaries of the law.

When we advise on transactions, we do more than deal with the legal issues. We involve ourselves conceptually, assist in developing strategies, jointly prepare for and conduct negotiations, try to remove stumbling blocks and find creative solutions for tricky issues.

Once we are engaged in contentious matters we move a step beyond. There, the clients' expectation is a certain outcome and it is our task to make that happen. This is the time for advocacy in the truest sense of the word. Advocacy ranges from defining, understanding, ranking and managing the key issues of the case and developing a grand, strategic design to setting the right dress code for hearings. It includes impeccable briefs, meticulous preparation for hearings and interrogation, on-the-spot intuition, charismatic pleading, constant alertness and vigilance, endless patience, uninterrupted awareness of the grand design and flexibility. To meet these challenges our dispute resolution teams loyally join forces with all their skills and talents – legal, intellectual, emotional, human and social – to make the clients' case.

Michael Kutschera
*Managing Partner, Binder Grösswang*

Cover Story **JUSTICE FOR COURTS OF ARBITRATION**

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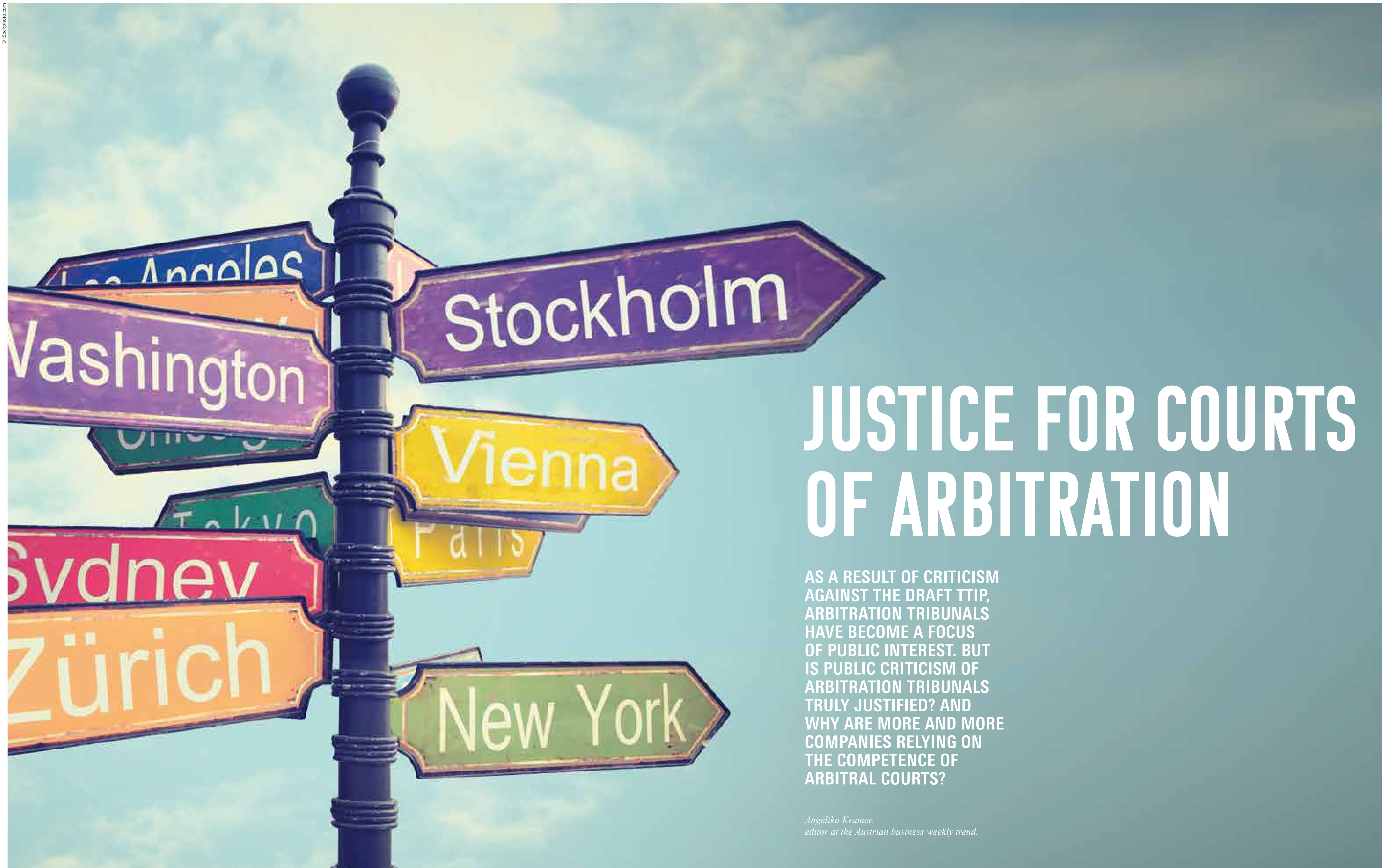


# JUSTICE FOR COURTS OF ARBITRATION

**AS A RESULT OF CRITICISM AGAINST THE DRAFT TTIP, ARBITRATION TRIBUNALS HAVE BECOME A FOCUS OF PUBLIC INTEREST. BUT IS PUBLIC CRITICISM OF ARBITRATION TRIBUNALS TRULY JUSTIFIED? AND WHY ARE MORE AND MORE COMPANIES RELYING ON THE COMPETENCE OF ARBITRAL COURTS?**

*Angelika Kramer,*
*editor at the Austrian business weekly trend.*

> The two contenders in Austria's recent race for the presidency, Alexander Van der Bellen and Norbert Hofer, arguably had only one enemy in common: TTIP, the Transatlantic Trade and Investment Partnership currently under negotiation between America and Europe. And there was hardly any point on which the two gentlemen agreed more than on how they see the arbitration procedures envisaged under TTIP. Private arbitral bodies are unnecessary in the European Union, said the one, while the other saw a "shadow judiciary" at work.

Arbitration procedures and arbitral tribunals have lately come in for much public attention in the context of the TTIP debate, but arbitration has been around for a long time, in many different forms and with considerable success. And by the way, arbitration proceedings play a major role in Austria as well – but we'll come to that later.

At the international level, investor protection has been regulated in international treaties and agreements for many decades. About 3,200 such agreements are in force around the world. They typically include investor-state dispute settlement (ISDS) mechanisms, enabling companies to protect their investments through proceedings in international arbitral tribunals. An ISDS mechanism of this kind is also foreseen in the draft TTIP. Most ISDS proceedings are conducted at the World Bank's International Centre for Settlement of Investment Disputes (ICSID) in Washington, D.C., so a brief look at that body may be indicative of what the signatory states could be facing when TTIP comes into force.

550 cases were pending at the ICSID by year-end 2015, with 52 new cases added in 2015 alone. Some of the cases involve parties linked to Austria. Six of these are still pending, including a case brought by the company Kunsttrans against Serbia, and another which the Austrian construction group Strabag instituted against Libya. Arbitration proceedings were also recently brought against the Republic of Austria. The plaintiff in this case is Meinl Bank, which claims that legal action taken by the Republic and its bodies against the bank amount to unfair persecution. Meinl Bank is claiming in excess of 200 million euro in the proceedings.

Some Europeans fear that they may find themselves at the mercy of all-powerful (and mostly American) arbitrators,

## IN CONVERSATION WITH BINDER GRÖSSWANG

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*Binder Grösswang Dispute Resolution Partners Christian Klausegger, Michael Kutschera and Ingeborg Edel*

**Everybody is talking about the Transatlantic Trade and Investment Partnership (TTIP), and the most controversial point is arbitration. Do you understand what all the fuss is about?**
Christian Klausegger: I do understand what it's about – the public does not know enough about international arbitration, and the opponents of TTIP oversimplify its main content and lump it together with arbitration.

**But what's so bad about resolving disputes in state courts of law?**
Michael Kutschera: The question is: Do we want foreign courts to have jurisdiction over Austria's international law disputes, or would we prefer to see them decided by an international, neutrally composed arbitral tribunal? We would not want to let a US court interpret what Austria may or may not do under a treaty concluded between Austria and the USA. And it's probably the same the other way round. A neutral arbitral tribunal of internationally recognised experts is certainly the better alternative.
Besides, arbitral tribunals dealing with issues of international law have been around for a long time, and they work well. Just think of the Permanent Court of Arbitration in The Hague.

**Criticism has been levelled at the TTIP draft because under the agreement, arbitral tribunals would not be made up of professional judges. The arbitrators would be lawyers like yourselves. Would impartiality and independence be guaranteed under such circumstances?**
Kutschera: The principles of independence and impartiality do of course apply in arbitration proceedings, and are taken very seriously. Any shortcomings are subject to very strict sanctions.

Ingeborg Edel: The arbitral award may even be set aside. Arbitrators have to be independent, even if they are nominated by the parties. If there is even the slightest indication that an arbitrator may not be independent, the nomination may be rejected.
Kutschera: The notion that arbitral tribunals are secretive insider clubs is utterly false. And what's more, arbitral decisions are also scrutinized by state courts of law upon application by either party.

**You just mentioned it yourself: arbitral bodies are often seen as being none too transparent – and in many cases, not even their decisions are made public. Isn't that problematic?**
Klausegger: In commercial proceedings, confidentiality is expressly desired by the parties – and is therefore one of the major advantages of arbitration. Proceedings involving investment protection issues are much more transparent. The website of the ICSID provides a database with detailed information, and decisions are published. I could imagine that arbitration proceedings in disputes of this kind may become even more transparent. There is certainly a trend in that direction.

**How does one become an arbitrator?**
Kutschera: The parties to the case or an arbitration institution choose suitable arbitrators. What is desired in many cases is specific professional or technical expertise, or certain language skills. Some arbitration institutions have lists of experts, but appointments are not restricted to these in most cases. There are no formal qualification requirements.
Klausegger: Most arbitrators have excellent training. There are dedicated academic programmes and even a summer academy offered by the University of Vienna.
Edel: We attend several conferences and training courses every year. After all, expertise is not something that comes off the top of your head. Most of our younger colleagues have also completed additional training abroad.
Kutschera: We have seen a remarkable development in arbitration over the last 30 years. Professionalization has advanced tremendously. There is definitely no room for laypeople here. One thing that is becoming more and more important is language skills. If you are fluent in several languages, you will be more often asked to sit on an arbitral tribunal.

# *"Arbitration tribunals are no secretive insider clubs"*

**Would it make a difference if the court of arbitration were established in Europe or in the USA?**
Kutschera: Well, there are certain technical differences, because arbitration proceedings are conducted on the basis and within the framework of the national procedural law of the place of arbitration. But in principle neither the process nor the outcome of arbitral proceedings is influenced by the place of arbitration. It´s rather international standards which affect arbitral proceedings. Vienna, for example, has an excellent international reputation as an arbitration venue because we have clear-cut, up-to-date arbitration rules and processes that meet international standards and create the prerequisites for swift, professional conduct of arbitral proceedings.

Edel: And there are many experienced arbitration law experts in Austria, some of whom also have excellent knowledge of investment arbitration. The courts are likewise geared towards it. The Austrian Supreme Court has a special panel of judges who deal with arbitration cases.

**How many experts are there? Can you give a number?**
Klausegger: I am sure there are more than a hundred in Austria. And about 80 to 90 per cent of them are lawyers.

**One of the advantages of arbitration is that proceedings are shorter. How much faster are arbitral tribunals?**
Klausegger: Most arbitral tribunals hand down their decision within one or two years. There are, of course, cases that take longer because they involve highly complex issues. However, proceedings in state courts usually take much longer, one important reason for this being the appeal process.

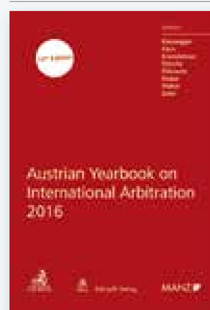
**And what about the enforceability of arbitral awards?**
Edel: In most cases, arbitral awards are a lot easier to enforce than other judgements, because nearly all UN member states have signed the New York Convention. So arbitral awards are enforceable nearly everywhere in the world.

**And there has never been a problem with that?**
Edel: Of course there are some parties who lose cases and then try to escape enforcement. But that is no different from the rulings of regular state courts. Given our experience and in cooperation with foreign colleagues we often manage to seize assets, and then the losing party usually pays what is due. One of our major successes was the enforcement of a foreign arbitral award, upon which we were able to freeze an Austrian bank account with a deposit of over 100 million euro.

**How does Vienna rank internationally as an arbitration venue?**
**Klausegger:** It may come as a surprise that Vienna is quite an important place of arbitration, it was ranked seventh in the world by the ICC in 2012.
**Kutschera:** Our advantages are modern arbitration rules with single-instance (set aside) proceedings; our location at the heart of Europe, which again proved its worth only recently as a suitable forum for the settlement of all kinds of international disputes, such as those associated with the lifting of sanctions against Iran; the large community of arbitration experts, and our highly developed infrastructure. It takes just 20 minutes to get from the airport to Vienna city centre, and you are unlikely to be held up en route and afterwards by strikes and other hindrances – those are tremendous advantages.

**Can you think of any aspects of arbitration in Austria that need reform?**
**Klausegger:** We see some scope for improvement in how we define consumers. At the moment, private foundations with considerable assets are regarded as consumers, which may render it impossible for them to enter into arbitration agreements.
**Edel:** And a cap should be set on court fees in proceedings that challenge arbitral awards. At the moment, no such ceiling exists. The Ministry knows that these reforms are sought.

**Would you agree that, regardless of TTIP, the arbitration caseload can be expected to grow?**
**Kutschera:** Generally speaking, litigiousness often depends on how the economy is faring. In good times, there is a greater inclination to come to a settlement. But in a squeeze, those in charge will often say that they cannot take the responsibility for a compromise and prefer to seek a ruling from a respected (arbitral) court.
**Klausegger:** Some sectors will definitely see an increase in arbitration proceedings: machinery and plant engineering, construction and financial services, IT and the whole M&A field. It's safe to say that we will see further advances in Vienna's position as an arbitration venue.




Austrian Yearbook on International Arbitration 2016

*Binder Grösswang dispute resolution partner Christian Klausegger is one of the editors of the* Austrian Yearbook on International Arbitration 2016, *a collection of articles on current issues in the area of commercial and investment arbitration. (MANZ Verlag Wien, Stämpfli Verlag, C.H. Beck, 978-3-214-00776-8)*

and that arbitral courts are in cahoots with big multinationals intent on bleeding poor states for all they are worth. These suspicions are not substantiated by ICSID statistics. Only eight per cent of parties to arbitration proceedings are multinational corporations, according to an OECD study. Nearly a quarter of all investors filing claims are small or indeed very small companies. Neither is there any evidence of the alleged majority of cases being won by companies. States prevail in more than twice as many cases as investors.

But is there any justification for the fear that US arbitrators would dominate the system? Another unfounded suspicion, going by the records. According to the 2015 Annual Report of the ICSID, nearly half of all arbitrators were from Western Europe in that year, including 16 from Austria.

Mr Van der Bellen's proposal to have state courts instead of arbitral tribunals decide on matters involving international agreements is deemed untenable by experts: "We would certainly not like to see Austria voluntarily submit to the jurisdiction of US courts in bilateral disputes," says Michael Kutschera, a partner in the law firm Binder Grösswang with years of experience as an international arbitrator. And it would probably be no different the other way round. This may be the reason why the US recently rejected a proposal by the EU to place jurisdiction in TTIP disputes with state courts instead of arbitral courts. But with mounting opposition within the EU, TTIP seems a long way off anyway.

While arbitration under TTIP may not become a reality for a while yet, commercial arbitration continues to enjoy growing popularity. To resolve disputes, many companies turn to arbitral tribunals in London, Paris, Zurich, and indeed Vienna – and they do it voluntarily and as a matter of conviction. Arbitral tribunals are appointed either ad hoc or by institutions such as the ICC in Paris, the London Court of International Arbitration or the Vienna International Arbitral Centre (VIAC). There are many reasons why commercial arbitration is growing: The volume of transnational transactions is going up globally, giving rise to more and more international disputes. Moreover, with a macro environment that's less than rosy, companies are not giving up on claims so quickly and are going to court more frequently. This has led to a real boom in arbitral proceedings, which offer several advantages. Parties appreciate the confidential nature of the proceedings, their speed and the high levels of technical expertise of the arbitrators. Add to that the fact that the litigation costs are lower, and thanks to the New York Convention, arbitral decisions are enforceable around the world.

"Most arbitral tribunals hand down a decision within one or two years," says Christian Klausegger, a partner in the law firm Binder Grösswang and President of the Austrian Arbitration Association (ArbAut) since the beginning of this year. On the cost side, it's primarily the size of the disputed claim that determines whether arbitration is an attractive option. If a case involves claims of around 100 million euro, the arbitrators' fees will likely be substantially below one million euro. Bringing the same matter before an Austrian state civil court would entail court costs of more than one million euro for first-instance proceedings alone. Experts recommend using arbitration in cases where the value in dispute is upwards of about one million euro.

The most important international arbitration venues are Paris, London, Geneva, Zurich, Singapore and New York. In recent years, Vienna has also developed a reputation in the field. The ICC's 2012 Statistical Report puts Vienna in seventh place in its international ranking, experts at Binder Grösswang say. Austria's neutrality and its sizeable community of more than one hundred experienced arbitration experts – a number of whom enjoy excellent standing as arbitrators in international cases – play a role in this development, as do good international transport links that put the city centre of Vienna within convenient reach of international parties. A reform of national legislation enacted in 2014 made Austria's Supreme Court the first and only instance that handles arbitration-related proceedings, including set aside proceedings. Austrian law has thus seen a significant shortening of judicial review of arbitral awards, further enhancing Vienna's attractiveness as an arbitration venue.

The website of the Vienna International Arbitral Centre (VIAC) reports 55 pending and 40 new cases for 2015. The cumulative value of the cases under consideration in Vienna last year was a hefty 1.32 billion euro. The public seldom hears about many of the major disputes that are resolved in confidential proceedings. In recent years, a substantial number of the cases that were dealt with quickly and discreetly involved long-term energy supply contracts. In this context, it has become public knowledge that Vienna was the chosen battleground for a fight in which Russian energy giant Gazprom confronted RWE and Econgas over long-term gas supply contracts. Proceedings of this calibre generate a tidy income for the city, with hotels, restaurants and taxi companies all taking their share. On average, arbitration parties are thought to run up a tab of some 200,000 euro in the Austrian capital.

Austrian lawyers have also discovered arbitration as an interesting field of professional practice. The law firm Binder Grösswang is home to one of Austria´s biggest dispute resolution teams. A group of more than 20 legal experts, most of them internationally trained, is intensively involved in arbitration proceedings, among other areas. Most of their work focuses on representing clients in commercial arbitration, with Binder Grösswang experts acting as counsel for a series of industry heavyweights from sectors such as energy, IT, construction and plant engineering. Binder Grösswang is also called in to assist in (generally still infrequent) arbitration proceedings involving parties from the financial industry. Partners in the firm are also active as arbitrators. It has become public knowledge that managing partner Michael Kutschera recently adjudicated in various major energy sector disputes, on some occasions acting as chairman of the arbitral tribunal involved.

**The conclusion is clear: TTIP doesn't have to make anyone nervous round here. Austria's lawyers and Binder Grösswang are well prepared for any challenges it may bring.** ●

**Insurance Litigation**

*Binder Grösswang dispute resolution lawyers Therese Frank and Christian Klausegger are the authors of the Austrian chapter of* Getting the Deal Through: Insurance Litigation 2016 *www.gettingthedealthrough.com*

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*Back row (left to right):*

*Stefan Albiez, Ingeborg Edel, Horst Lukanec, Michael Kutschera, Therese Frank, Diana Holzinger, Oliver Loksa, Clarissa Nitsch, Angelika Pallwein-Prettner, Christian Klausegger*

*Front row (left to right):*

*Barbara Sesser, Elisabeth Tretthahn, Thomas Baumgartner, Elisabeth Gehringer, Sara Khalil, Vincent Vertneg, Adrian Zwettler, Pilar Koukol, Quido Gero*

# DIFFERENT ANGLE – NEW DIMENSIONS

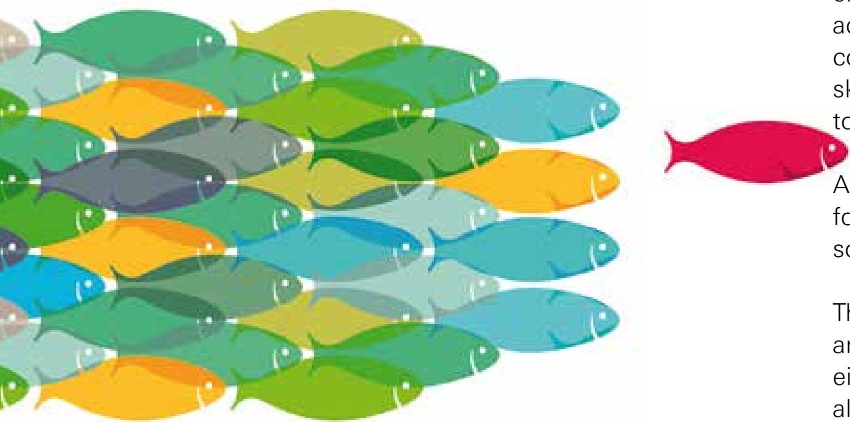
In a changing market environment, Binder Grösswang's dispute resolution specialists stand together as one of the leading – and growing – teams in the market. The team is one of the biggest in Austria and is top-ranked in all reputable national and international directories. We have focussed all our forces on building this position, today the Binder Grösswang team is the benchmark leader for dispute resolution in Austria. **However, we do not rest on our laurels. We keep moving, we spearhead developments, we blaze new trails and remain open for new angles. We get the greater picture and the detailed insights.**

Through our team members' wide-ranging experience in legal proceedings and arbitration and our tactical strengths, we give our clients optimum support in enforcing their rights. With the right mixture of clout and flair, we have already brought a multitude of proceedings to a successful conclusion. We are known for our realistic assessment of opportunities and risks in each phase of proceedings and our corresponding targeted approach. Partners from our law firm are sought after as arbitrators in the domestic market and abroad.

# NO CLASS ACTIONS IN AUSTRIA?

The discussion in Austria regarding new legal provisions on group actions, class actions and test cases is gaining momentum.

This is due, on the one hand, to the heavy case burden the courts have had to deal with for many years because of the thousands of suits brought by investors, and, on the other hand, to an accumulation of liability cases that potentially could be brought as class actions (e.g., the motor vehicle "emissions scandal", defective mass products, investment losses, accidents with mass transport vehicles, etc.).



In the current debate, the impression often arises that in Austria there is no possibility to take legal action as a group when it comes to legally relevant mass phenomena. This impression is incorrect.

**"Austrian-style class action"**
The fact is that although the Austrian Code of Civil Procedure does not specifically refer to the instruments of "class action" or "group action" by name, there are, nevertheless, a variety of possibilities for group interventions. In practice, the most notable of these is the "Austrian-style class action". This approach is frequently chosen by consumer protection organizations: they have the consumers assign their claims to the organization, and then assert the pooled claims in court as the litigant.

In a class action of this type, the court first has to verify whether the claims are all based on grounds that are sufficiently similar as to make it admissible to pool them in one and the same lawsuit. If this condition is met, the claims of any number of persons can be asserted in a single action.

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**Joinder of proceedings**
The court, too, can, ex officio, consolidate individual proceedings that are independent of each other into joint proceedings with a joint decision if it is to be expected that this will result in procedural economy. It is done quite simply by the judge's taking the decision to have similar, parallel proceedings brought before him/her in a joint hearing. This is another way of creating, for all practical purposes, a class action. In practice, this option is used quite frequently by the courts.

**Legal action taken by associations, test cases**
For a long time now, certain associations (including consumer protection institutions) have had the legal right to take action against unfair commercial practices or violations of consumer protection law by means of so-called "Verbandsklagen" (legal action taken by associations), without having to be personally affected by these practices or violations.

At present, Austrian law also permits test cases and provides for a substantially simplified procedure by which entitled associations can appeal to the Supreme Court in this context.

The last large-scale attempt to achieve a comprehensive amendment to the law in the matter of group actions failed eight years ago. It is not surprising that in this area, specifically, it is difficult to find a solution that is acceptable to all concerned. For one thing, there are many aspects in which two totally contrary positions collide (opt-in vs. opt-out model; supervision of the lead plaintiff; the role of litigation funders; preconditions for a group action, etc.). Also, the current possibilities for group interventions under applicable Austrian law function quite well, given that they have developed out of the overall system of civil procedure and are accordingly well-integrated in it.

Nonetheless, new legal provisions would certainly make sense if they led to tangible, well-balanced improvements for all concerned: improvements such as, in particular, the creation of more streamlined procedural structures, combined with a shorter duration of the legal proceedings and effective controls regarding the safeguarding of interests and the prevention of misuse.

**Stefan Albiez**
Binder Grösswang
Dispute Resolution Team

OPINION

## DO NOT PROVOKE THE EASILY EXCITED PUBLIC OPINION

**Significance, Possibilities and Functions of Communications Support in Class Actions**

Class actions often draw and hold the attention of the public and the media – not only because the damages claimed are frequently very high. As a result, defendants (companies) risk a loss of reputation and a damaged image. Plaintiffs' lawyers tend to mount massive and sometimes also robust campaigns, and the "attackers" can be relatively sure of having public opinion in their favour. For these reasons, professional communications advice and support is particularly important in class actions. Litigation communication has several central objectives: It provides support throughout the legal dispute or helps to achieve an early out-of-court settlement. Moreover, it has the purpose of protecting the reputation of the client, i.e. the company being sued, before, during and after any legal proceedings that may take place.

Litigation communication experts work in close cooperation with lawyers for the good of their common clients. The main object, from the beginning, is to present the client's standpoint to the media and the public as quickly and as plausibly as possible. The basis for this is the communication of carefully and strategically orchestrated information. This also includes, for example, explaining the actual facts of the case and the legal situation, from the company's perspective, to media representatives who are often relatively uninformed – and doing so untiringly and repeatedly.

Company spokespersons (and sometimes also lawyers) tend to make statements to the effect that they "cannot comment on ongoing proceedings" and hope that this will suffice to "quiet things down". Such hopes are delusive, since plaintiffs, media, aggrieved parties, etc. will do everything in their power to thwart them. Active, controlled communication by means of precisely planned activities and measures is the best of all conceivable strategies.

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**Harald Schiffl**
Managing Partner
wikopreventk GmbH

OPINION

## CLASS ACTIONS FROM THE PERSPECTIVE OF THE BUSINESS SECTOR

It is general knowledge that companies being sued in class actions face particular chal-lenges. Not only are such proceedings especially time-consuming and expensive, but above and beyond the legal proceedings, plaintiffs sometimes make use of other means, such as the media, to "convince" the company to capitulate for reasons quite apart from legal considerations.

The business sector is correspondingly opposed to ideas currently being contemplated for changing this situation to the further disadvantage of sued companies. In principle, a functioning system already exists in the form of the Austrian-style class action, various aspects of which have been further developed in recent years, primarily through the Austrian Consumers' Association. If we take a look at the class and group actions of recent years, we can see that the particular challenge is related to the courts.

In addition, conflicts of interest have been frequently observed between the players of the complaining party: the lead plaintiff, the class members, the litigation funder and the lawyer, all of whom have various interests of their own that are by no means all identical. It is therefore worth considering whether and how a form of supervision could be designed in this respect. The European Commission's clear commitment to keeping the potential for misuse in this area to a minimum, for instance by means of the opt-in principle, retention of the loser pay principle and rejection of punitive damages, is welcome. However, it is questionable whether the manifold suggestions made for possible changes to the system are capable of improving the legal procedure.

If changes are made at all, they will have to maintain a balance. If class actions are used for pursuing claims for damages, it must be clear that, while maintaining the core objective of the law of damages, such pursuit remains a pursuit of subjective private rights.

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**Rosemarie Schön**
Head of Department
Legal Policy Department

UP TP DATE

# SUPREME COURT ON VERTICAL RESTRAINTS

NO

At the end of last year, the Austrian Supreme Court handed down a long-awaited judgement concerning vertical restraints between the Austrian food retailer SPAR and some of its suppliers. The judgement covered issues such as resale price maintenance, including so-called hub-and-spoke agreements and most-favoured-customer clauses (MFCs). Prior to the legal proceedings, the Austrian Federal Competition Authority (FCA) had conducted long-term investigations in the case, including a dawn raid on the company's premises. Those actions by the FCA were part of broader investigations into the food retail sector that had been going on for several years. In the course of that sector-focused investigation, the FCA made settlement agreements with most of the undertakings concerned (retailers as well as their suppliers), the most prominent of which was a EUR 20.8 million settlement with the supermarket chain REWE.

The dispute between the FCA and SPAR was particularly intensive and emotional. SPAR refused to settle and, hence, the case went to court – initially only in regard to one of sixteen investigated product groups. The Cartel Court, as the court of first instance, imposed a penalty of EUR 3 million on SPAR. However, both SPAR and the FCA appealed. In a most remarkable decision, the Supreme Court increased SPAR's fine tenfold to EUR 30 million. This was the first time in the history of Austrian competition law that a fine had been so harshly increased in an appeal decision. In its judgement, the Supreme Court stated that the kind of vertical restraints at issue were not a "grey zone", as argued by SPAR, but constituted per se restrictions of competition under Austrian and EU competition law. The Supreme Court noted that also MFCs, as used by Spar to enforce the vertical agreements in question, were per se restrictions of competition and thus infringements of competition law, so that there was no need for further investigation of their effects on the market.

Due to the fact that hub-and-spoke agreements had been widely used in Austria prior to the aforementioned actions of the FCA, this judgement is particularly important, and even more so in light of the fact that MFCs are used not only in the food retail sector, but in various other industries as well. The general statements of the Supreme Court regarding the evaluation of such clauses will therefore affect many types of agreements. Unfortunately, the Supreme Court did not go into detail on scenarios in which such MFCs might be permitted. In particular, it did not refer at all to the view that MFCs might be exempt from the prohibition under EU competition law and might even promote competition instead of restraining it.

This Supreme Court decision changed the landscape of Austrian competition law in terms of the magnitude of fines that could be imposed in regard to vertical restraints. Hub-and-spoke agreements, in particular, are deemed to be highly problematic. As regards MFCs, the discussion should continue, and hopefully the merits of such agreements, at least as used in some instances, will also be recognised by the Austrian courts in the future.

**Raoul Hoffer**
Binder Grösswang
Competition Team





BACKGROUND

# RIGHTS PROTECTION MECHANISMS AND NEW GTLDS

TM

Trademark infringements such as cybersquatting, domain grabbing or domain hacking are no new phenomena, but are still proving to be challenging for many trademark holders. Whereas the launch of the New generic Top Level Domain (New gTLD) Program by the Internet Corporation for Assigned Names and Numbers (ICANN) made the registration of many new domains possible, the protection of rights in the Internet became even more difficult. Although New gTLDs are innovative and allow trademark holders to broaden their online presence, possibilities for infringement have, at the same time, been multiplied by the new namespaces.

The number of registered New gTLDs is expected to reach 1,300 soon, and therefore the possible danger for trademark holders is eminent. In addition, such cases of infringement are often transnational, which can make the enforcement of rights more complicated or even impossible. As the ICANN is aware of this, it has installed rights protection mechanisms to support and protect trademark holders, including the Trademark Clearing House, the Uniform Rapid Suspension System (URS) and certain others, such as the Trademark Post-Delegation Dispute Resolution Procedure.

However, prior to the introduction of these new procedures, the Uniform Domain Name Dispute Resolution Policy (UDRP) was already established by the World Intellectual Property Organization (WIPO) and ICANN in 1999. The UDRP had been applicable to second-level domain name registrations for some gTLDs (generic top level domains) and is now mandatory for all New gTLDs.

Proceedings under the UDRP are started by electronically filing complaint with an approved UDRP provider. The costs are not high, and vary depending on the number of domains and the number of penalties, but in any case range between USD 1,500 and 5,000. Decisions are usually reached quickly, in up to two months. Complainants have to prove that they hold better rights and that the infringing domain name is identical or confusingly similar to the complainant's trademark or service mark. We advise thorough preparation of such a complaint and investigation as to whether the potential respondent has other rights than just their domain name.

In 2015, a total of 2,179 UDRP cases were processed at WIPO. In 1,943 cases, the outcome was the transfer of the domain to the complainant, in 47 cases the domain had to be cancelled, and only 189 complaints were denied.

The URS was designed to provide a lower-cost, faster-track mechanism for rights holders who can demonstrate very clear-cut cases or infringements, and allows the rights holders to temporarily suspend the domain name. However, figures show that this relatively new dispute policy has not been accepted yet. In 2015, only one out of every 51,378 New gTLD registrations was subject to a URS complaint. This might be due to the fact that this new system lacks an established "case law" and has a high burden of proof.

To sum up: The UDRP provides trademark holders with a fast and not very expensive rights protection mechanism. Apparently, for cross-national cases it helps to resolve the obstacles associated with transnationality. In very clear-cut cases with high urgency, it is also worthwhile to try the URS. Trademark holders should always consider these alternative dispute resolution mechanisms when dealing with trademark infringements in the Internet world.

**Ivo Rungg**
Binder Grösswang
Unfair Competition and IP Team

TOPIC

# DAWN OF A NEW ERA IN EU-IRAN RELATIONS?

Over the past decade, the EU – in line with the approach taken at the international level (UN) – introduced and gradually tightened nuclear-related financial and commercial sanctions against the Islamic Republic of Iran. The sanctions were aimed at forcing Iran to adopt a peaceful nuclear policy. Diplomatic initiatives, which started in 2013, finally culminated in an unprecedented settlement of the long-lasting dispute on 14 July 2015. Almost exactly 200 years after the close of the Congress of Vienna, another important international agreement was signed in the Austrian capital. The so-called Joint Comprehensive Plan of Action (JCPOA), commonly known as the Iran deal, was incorporated in a UN resolution and in EU legislation to ensure the (partial) lifting of the Iran sanctions in exchange for stringent nuclear-related commitments on the part of Iran. After the IAEA verified that Iran had met its commitments under the JCPOA, the deal was declared "implemented" and a new era was supposed to start on 16 January, 2016.

Half a year later, the new opportunities have not yet translated into a fulminant rush into Iran, mainly due – believe it or not – to residual restrictive measures of the EU and, more importantly, of the US, the fact that Iranian banks (even if no longer "listed") are lagging behind international standards (Financial Action Task Force – FATF, for combatting money laundering) and the hesitancy of Western banks to finance transactions with Iran (outside of state guarantee schemes). In particular, the US "primary sanctions" make it (almost) impossible for natural and legal persons with a US-nexus (including, for example, EU entities controlled by a US parent company or suppliers of goods with a US origin) to engage in operations with Iranian counterparts. In this context, a lawyer's mind circulates around a "carve-out" of the EU business, an effective compliance system, attempts (if needed) to obtain a so-called General License H from the OFAC, and/or a reshuffle in the supply chain.

We at Binder Grösswang are happy to assist in this new area of law in order to promote a new era in business relationships between the international community and Iran.

**Johannes Barbist**
Binder Grösswang
Regulatory Team

*Binder Grösswang partner Johannes Barbist, together with associate Regina Kröll, lectured at the seminar "IRAN – Export Law & Contracts – Transport, Certification, Sanctioning Regimes" of the ICC Austria (International Chamber of Commerce Austria) where he spoke on the subject of "Remaining Sanctions – New Chances".*

UP TO DATE

## PURCHASE OF HOTEL IMPERIAL

Binder Grösswang advised the Al Habtoor Group on the purchase of Hotel Imperial from companies of the Starwood Group.

Hotel Imperial, one of the most famous historic hotels on Vienna's Ringstraße, was built as the private residence of the Prince of Württemberg. It was transformed into a hotel for the Universal Exhibition in 1873 and soon became world renowned. The Imperial's guests have included – and still include – emperors, kings and statesmen as well as famous composers, authors and actors.

The Al Habtoor Group, with headquarters in Dubai, United Arab Emirates, has operations in the sectors of construction, hotels, the automotive industry, real estate, education and publishing.

Binder Grösswang's core team was composed of partners Michael Kutschera and Markus Uitz.

## 19 MERGER FILINGS REGARDING THE RESTRUCTURING OF THE COOPERATIVE BANKS SECTOR (VOLKSBANKEN)

Binder Grösswang´s competition law counsel **Isabelle Innerhofer** advised the cooperative banks (Volksbanken) regarding the merger control and competition law aspects of the restructuring of the Austrian cooperative banks sector in more than 19 Austrian merger proceedings (with more to come in the future). The overall restructuring of the Austrian Volksbanken sector continues to be led by Binder Grösswang's partners Michael Binder (banking regulatory) and Gottfried Gassner (corporate/M&A).

## COUNSEL TO ARDIAN ON ACQUISITION OF GANTNER HOLDING

Binder Grösswang, with **Thomas Schirmer** as lead partner, served as Austrian counsel to the French private equity company ARDIAN (formerly AXA Private Equity) on the acquisition of GANTNER Holding GmbH, headquartered in Schruns, Austria.

GANTNER is a leading international manufacturer of contactless RFID and NFC access control and staff time recording systems facilitating automatic identification. Its solutions can be found in leisure facilities as well as in commercial and public buildings. It is the market leader in the niche segment for fitness clubs in Europe, counting many prestigious leisure facilities as clients – among them FitnessFirst, Holmes Place, McFit and Elements. GANTNER has subsidiaries in Germany, the UK, Dubai and Australia, and operates in more than 60 countries.

As part of the transaction, the existing management team, which has been successfully overseeing the GANTNER growth strategy for more than ten years, will invest in the company, thus providing the continuity that will ensure its further successful development.

## FINANCING FOR SUPERNOVA'S ACQUISITION OF BAUMAX ASSETS – ONE OF THE BIGGEST DISTRESSED M&A ASSET DEALS IN AUSTRIA AND CEE

Binder Grösswang's banking and fi nance team, headed by lead partner **Stefan Tiefenthaler**, advised Landesbank Hessen-Thüringen (Helaba) in connection with Supernova's acquisition of a portfolio of hardware stores of the bauMax Group. The Austrian home improvement chain bauMax has been taken over by the German DIY group Obi and the Austrian property developer Supernova.

## SALE OF AUSTRIAN MOZART DISTILLERIE TO SCHLUMBERGER

A team led by Binder Grösswang Corporate/M&A partner **Markus Uitz** advised the American group Beam Suntory on the sale of Mozart Distillerie GmbH to Schlumberger Wein- und Sektkellerei.

Mozart Distillerie, based in Salzburg, produces chocolate liqueurs from Austria and is the global market leader in this fi eld. It is especially well known for its chocolate liqueurs Mozart Chocolate Cream, Mozart Dark Chocolate, White Chocolate and Rosé Gold. The production plants and company premises are in Salzburg and were acquired in their entirety by Schlumberger. The 30 employees at the Salzburg location will be retained.

Beam Suntory, headquartered in Deerfield, Illinois (USA), is the third-largest spirits company worldwide, with more than 4,000 employees at 17 locations.

## FINANCING OF FOOTBALL STADIUM FOR SK RAPID

Binder Grösswang partner Stefan Tiefenthaler advised UniCredit Bank Austria und ERSTE Bank in connection with the fi nancing for the construction of the new football stadium of SK Rapid Wien.

The new stadium continues to take shape and will be completed for the start of the 2016/2017 season. It will be the most modern stadium in Austria, with a capacity of 28,500 for domestic league games. As a UEFA Category 4 Stadium,the new Allianz Stadium qualifies to host international football matches.

# BUSINESS CLIPPINGS

## THE LAWYER EUROPEAN AWARDS 2016: BINDER GRÖSSWANG IS THE "AUSTRIAN LAW FIRM OF THE YEAR"

Binder Grösswang is the winner of "The Lawyer European Award 2016" for Austria. The award-giving ceremony was held in London in March 2016.

Every year, the renowned British journal The Lawyer honours the best law firms in various European countries. Binder Grösswang was dubbed "Law Firm of the Year: Austria" 2016; partner Emanuel Welten accepted the international award on behalf of the law firm at the "The Lawyer European Award Ceremony" in London.

The criteria assessed were "strategic vision, particularly focused on cross-border initiatives", "robust partnership culture", "strong financial performance and growth", "consistent excellence in delivery of legal services" and "outstanding talent management". The judges, prominent international lawyers and in-house counsels, commended Binder Grösswang for its advisory activities in numerous complex cross-border transactions of the past year, the excellent international network of which the law firm is a part, its employee satisfaction and its corporate social responsibility programme.

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## TAX LAWYERS – PERSPECTIVES FOR A CAREER IN THE FIELD OF TAX LAW

Binder Grösswang partner Christian Wimpissinger was a member of the guest panel at the "Career Talk" panel discussion held at the Vienna University of Economics and Business / Institute for Austrian and International Tax Law on 12 May 2016. The panel discussion was entitled "Tax Lawyers – Perspectives for a Career in the Field of Tax Law".

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## BINDER GRÖSSWANG'S TEAM WINS IN MOOT COURT ON COMPETITION LAW

The winners of this year's Moot Court on Competition Law came from Innsbruck: The team supervised by Binder Grösswang partner Johannes Barbist won the finals held at Haus der Europäischen Union in Vienna's first district on 11 May 2016.

This time, the students had to prepare a fictive application to the Cartel Court regarding an antitrust case focussing on an exclusive purchasing obligation in a contract on coffee stand machines and a category management system. We congratulate the winners most heartily! The objective of the Moot Court is to give students an opportunity to apply their theoretical knowledge in practice.

In January a team advised by Binder Grösswang partners Bernd Schneiderbauer and Markus Uitz had won the finals of the "ELSA Seal the Deal M&A Contract Competition" held at the University of Vienna Faculty of Law.

*From left to right: Austrian Federal Minister of Justice Wolfgang Brandstetter, winning team members Mirjam Egerbacher and Martin Gassler, Johannes Barbist*

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## ONE OF AUSTRIA'S BEST EMPLOYERS: "GREAT PLACE TO WORK 2016" AWARD TO BINDER GRÖSSWANG

On 17 March 2016, Binder Grösswang was awarded one of the 2016 prizes for best employers in Austria at the award ceremony which took place at Vienna's Ferstel Palace under the auspices of Great Place to Work®.

Great Place to Work® does a renowned benchmark study, measuring workplace culture and job quality to identify Austria's best employers; the study includes an extensive engagement survey and an audit of corporate culture in respect of human resources, with a focus on credibility, respect, fairness, pride and team spirit.

As Raoul Hoffer, the partner in charge of HR, says: "We try to foster the concept of a confidence-based workplace culture and fill it with life. It's not a matter of isolated measures, it's a deliberate strategy. People who enjoy their work contribute decisively to corporate success. Respect for one another, interpersonal values and a culture of understanding are part of our mission statement. We foster relations on an equal footing, give our employees encouragement and support, and focus on innovation. Thus, we consider ourselves pioneers in our field of activities. We are particularly happy to see our values reflected in a study which produces measurable results, and we believe that the award confirms our approach. It's an accolade that goes to every single person working in our law firm. Congratulations to all our employees!"

Managing Partner Michael Kutschera comments: "We are delighted to be have been dubbed a 'Great Place to Work'. The award shows that our efforts are leading us in the right direction: The work environment we seek to create at Binder Grösswang is meant to be an inspiration to everyone working here, one that everyone can identify with. To us, the award is a mandate to continue making Binder Grösswang a place where work is enjoyed and bestows meaning."

In 2014 Binder Grösswang was the first law firm in Austria to be honoured with a "Great Place to Work" certificate.

## VIENNA HONOURS CONFERENCE ORGANIZERS AFTER RECORD YEAR

On behalf of all conference organizers who had brought international conferences to Vienna last year, Binder Grösswang's Managing Partner Michael Kutschera accepted an award from the City of Vienna. Kutschera was chairman of the host commitee of the Annual Conference of the International Bar Association (IBA, the world's leading organization of international legal practitioners), with approximately 6,000 participants, which was held in Vienna from 4 to 9 October 2015.

In 2015, Vienna's conference industry achieved new records in all relevant key figures, and its contribution to value creation Austria-wide exceeded the one-billion euro mark for the first time. Spirits were correspondingly high among the approx. 350 Viennese conference organizers who came to the Vienna City Hall on 11 May 2016 to be honoured for their achievement at a festive ceremony.

*From left to right: Vienna Convention Bureau Director Christian Mutschlechner, Béatrice Kutschera-Ingold and Michael Kutschera, City Councillor Katharina Schinner, Vienna Tourist Board Director Norbert Kettner*

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*Arb|Aut President Christian Klausegger and Professor Paul Oberhammer (Faculty of Law, University of Vienna) welcomed international arbitration experts to the Vis Moot in Vienna. From left to right: Oberhammer, Franz T. Schwarz (Wilmer Cutler Pickering Hale and Dorr LLP, London), Bergsten, Klausegger*

## VIS ARBITRATION MOOT

In March 2016, Paul Oberhammer, professor of civil procedure law and Dean of the Faculty of Law at the University of Vienna, and Christian Klausegger, President of the Austrian Arbitration Association Arb|Aut and dispute resolution partner at Binder Grösswang, hosted the Fourth Annual Eric Bergsten Lecture on International Arbitration, held at the Austrian Economic Chamber within the framework of the Willem C. Vis International Commercial Arbitration Moot finals.

Christian Klausegger paid tribute to Professor Eric Bergsten, the "father" of the Vis Arbitration Moot, who was its organizer for over 20 years. The Vis Moot is an international competition in the field of international arbitration, during which students from more than 300 universities develop their practical abilities by preparing comprehensive legal support for a fictive case. The Vis Moot has an excellent reputation among arbitration experts the world over, and is known, for good reason, as the "Olympic Games of international commercial law".

On the evening of 12 May 2016, Binder Grösswang held its latest discussion in the series "Binder Grösswang impulse" in the conference area of the firm. The topic was **"TTIP – A Free-Trade Agreement Like Any Other?!"**. Michael Kutschera, Managing Partner of Binder Grösswang, welcomed the speakers Günther Apfalter, President of Magna Europe & Magna Steyr; Georg Kapsch, President of the Federation of Austrian Industries; Johann Marihart, CEO of AGRANA Beteiligungs-AG and Gert Rücker, Managing Partner of JMB Fashion Team. The discussion was moderated by Martina Salomon, Deputy Editor-in-Chief and Economics Editor of the daily newspaper KURIER. Approximately 200 invited guests attended.

# TTIP – A FREE-TRADE AGREEMENT LIKE ANY OTHER?!

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## CHAMBERS EUROPE 2016

ON DISPUTE RESOLUTION

Market-leading dispute resolution team providing excellent litigation advice. Also instructed on high-stakes international arbitration cases. Represents a number of financial services providers and multinational companies. Increasingly active in the utilities, automotive, transport and IT sectors. "We are completely satisfied with the quality of the services. The advice was provided promptly and the lawyers were always available." "The most important thing was that the team was so responsive and helpful. It was very helpful that the lawyers were so reliable."

## IFLR 1000 2016 ON CORPORATE

Binder Grösswang has a strong corporate team that has grown noticeable on the market's bigger deals. Some excellent client feedback and work on deals at the top end of the market sees Binder in Tier 1 for M&A. "Flexible, always reachable (seems that they are working 24 hours a day), reliable and always to the point," says one client of the corporate team. "Good preparation, pragmatic execution, efficient communication, thorough follow-up. They felt almost like part of our internal team," is another client's feedback on the M&A team.

## THE LEGAL 500 2016

ON EU AND COMPETITION

The 'highly dedicated', 'practical' Raoul Hoffer heads Binder Grösswang's 'strong' team, which has specialist expertise covering the full range of antitrust matters and a strong client portfolio across many industry sectors. It advised Novomatic on the acquisition of a stake in Casinos Austria. The 'very responsive', 'clear' and 'incredibly knowledgeable' Christine Dietz is 'very pragmatic with a good sense of humour', and 'always goes the extra mile'.

## JUVE, MAGAZIN FÜR WIRTSCHAFTSJURISTEN IN ÖSTERREICH 2016

ZU BANK- UND FINANZRECHT / KAPITALMARKTRECHT

Die Kanzlei stellte mit einem erstaunlich starken Transaktionsaufkommen im Kapitalmarktrecht und zentralen Mandaten im Bankrecht unter Beweis, dass sie inzwischen in beiden Bereichen zu den führenden in Österreich zählt. In einem schwachen ECM-Markt sicherte sich das Team ein großes Stück des Kuchens… Im DCM-Bereich überzeugte die Kanzlei mit einer Vielzahl von Emissionen... Dass Binder Grösswang in jeder Hinsicht zu den Top-Banking-Praxen zählt, zeigt ihre Rolle im HETA-Streit… Beim Zusammengehen von bislang 40 Volksbanken kommt der Kanzlei ebenfalls eine juristische Schlüsselrolle zu. Stärken: Breite Kompetenz bei Finanzierungen, DCM-Prospekten u. Eigenkapitalmaßnahmen; enges Verhältnis zu österr. Regionalbanken; intensive Vernetzung mit den marktführenden Bank- und Kapitalmarktkanzleien in London und Frankfurt.

## CHAMBERS EUROPE 2016

ON CORPORATE M&A

"It was quite a tense acquisition situation. I have only the highest praise for BINDER." "The team is very fast and always friendly." "BINDER has done a fantastic job. The lawyers are responsive and pragmatic, working seamlessly together."

## THE LEGAL 500 2016

ON PRIVATE CLIENT

Binder Grösswang's practice has a strong profile in succession, foundation and investment advisory work. The team is able to call on colleagues in the firm's robust corporate and tax teams.

## CHAMBERS EUROPE 2016

ON EMPLOYMENT

"Although BINDER GRÖSSWANG is one of the largest and most recognised firms in Austria, it gives us the feeling that we are important. We particularly appreciate that it works very efficiently and transparently." "The team is very responsive, uncomplicated and pragmatic."

## IFLR 1000 2016 ON BANKING

Traditionally, Binder Grösswang is known for its excellent banking practice. One client of the firm's banking team describes it as "very responsive, very reliable", adding: "It is a team of experienced Austrian lawyers with significant international flavour. The best independent local law firm in Austria; a pleasure to work with."

## CHAMBERS EUROPE 2016

ON TAX

"The practice is very experienced with a good background in company structures. The lawyers have long-term vision." "A very diligent team with a broad and deep knowledge of tax issues."

## TREND RANKING 04/2016

ON DISPUTE RESOLUTION

| Anwalt | Kanzlei |
|---|---|
| Ch. Klausegger | Binder Grösswang |
| Gerold Zeiler | Zeiler |
| Alexander Klauser | bkp |
| Thomas Kustor | Freshfields |
| Bettina Knötzl | Knoetzl |
| Nikolaus Vavrovsky | Vavrovsky Heine Marth |
| Nikolaus Pitkowitz | Graf & Pitkowitz |
| F. Kremslehner | Dorda Brugger Jordis |
| Stefan Riegler | Baker & McKenzie |
| Irene Welser | CHSH |

## OLIVER LOKSA

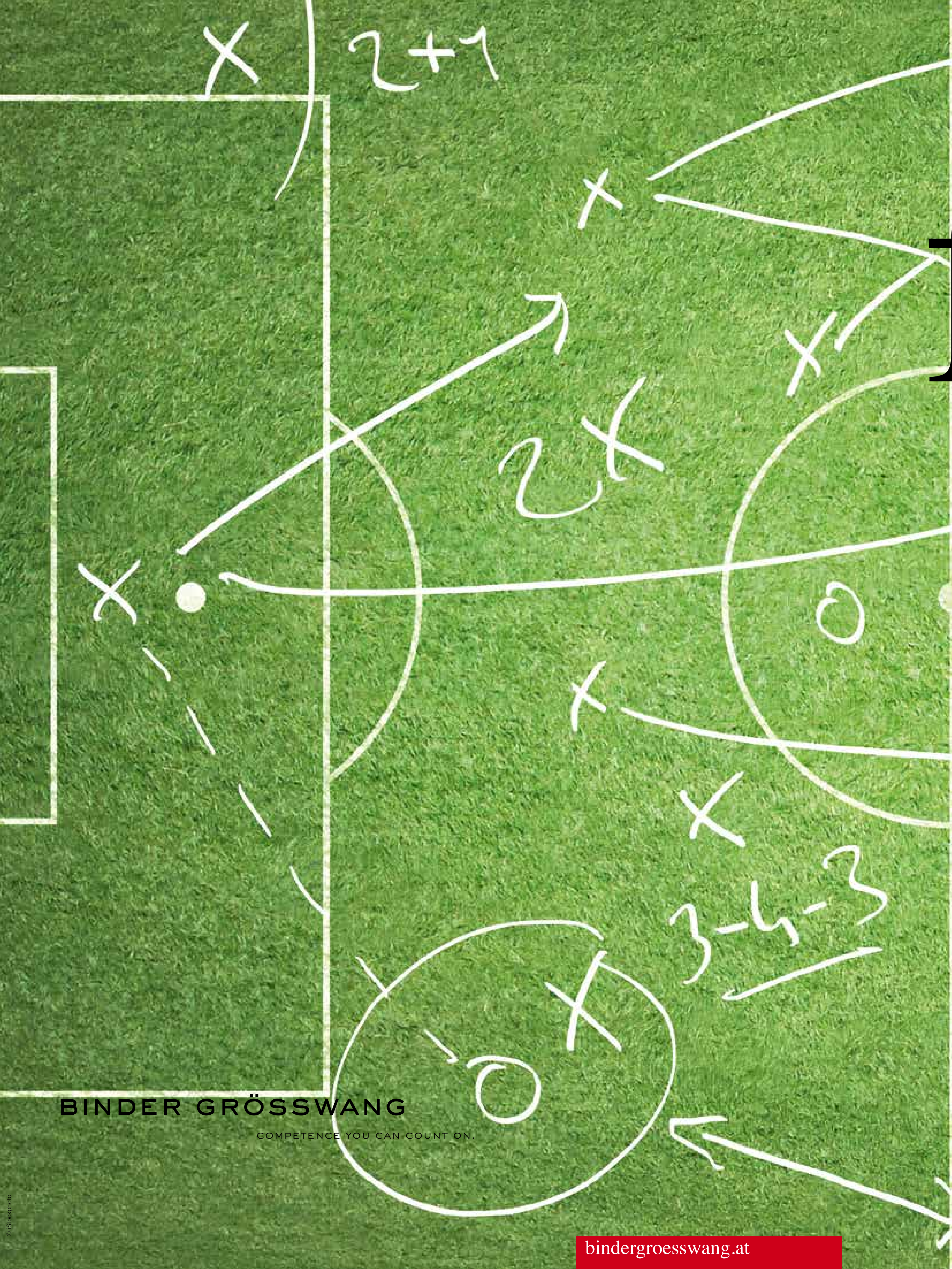
DISPUTE RESOLUTION AND CORPORATE/M&A

Oliver Loksa, Attorney at Law, was admitted to the bar in May 2016. He joined Binder Grösswang in September 2015 as a senior associate, supporting Binder Grösswang's Dispute Resolution and Corporate/M&A teams. He has been involved in national and international arbitral proceedings under various arbitration rules on a regular basis and is a member of numerous arbitration associations. He also advises Austrian and foreign corporations on M&A activities as well as on questions of corporate and civil law. In addition, he has advised on numerous complex white-collar crime proceedings over the past years. Before joining Binder Grösswang, Oliver Loksa gained extensive experience at international law firms in Austria and Hungary, and at the Vienna International Arbitral Centre. He studied in Vienna and Budapest, and speaks German, English, Hungarian and Slovak.

## STEFAN FRANK

BANKING & FINANCE

Dr. Stefan Frank LL.M. (Sacramento) has strengthened Binder Grösswang's Banking & Finance team as an attorney at law since January 2016. He was previously employed with Raiffeisen-Holding NÖ-Wien, where he operated as an expert on banking supervision law. Stefan Frank's fields of specialization are banking supervision law, securities regulation law, investment fund law and corporate law. He advises mainly Austrian and international banks, securities firms, investment fund management companies, payment companies and e-commerce businesses, as well as diverse companies on matters of company law. Stefan Frank studied in Vienna and Sacramento, and publishes regularly on banking law, securities law and company law.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